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No. 85-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY,
Petitioner,

vs.

KENNETH L. BAKER, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Does state regulation of airport operations to achieve noise abatement through imposition of repetitive nuisance liability on proprietors of public airports violate the supremacy clause as applied by this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)?

2. Does state regulation of airport operations to achieve noise abatement through imposition of repetitive nuisance liability on proprietors of public airports result in an undue burden on interstate commerce in violation of the commerce clause of the United States Constitution?

PARTIES BELOW

The parties to the proceedings in the California Supreme Court from which review is sought are Petitioner Burbank-Glendale-Pasadena Airport Authority* and Respondents Mr. and Mrs. Kenneth L. Baker, Patrick J. Bigley, William & Jan Billos, Joe & Angie DeCasper, Charles & Janet Ludecke, Mr. & Mrs. Frank B. Miller, Sr., Thomas D. & Irene Pineiro, Gary & Gail Rainwater, John & Allison Rocke, Herb & Rose Rosen, Michael A. Rotella, Michael & Irma Taranto and Carl & Doris Waugh.

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*Petitioner Burbank-Glendale-Pasadena Airport Authority is a joint powers agency created by the cities of Burbank, Glendale and Pasadena pursuant to California Government Code §§ 6500 *et seq.* and 6546.1.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Parties Below	i
Opinions Below	1
Jurisdiction	2
Constitutional Provisions And Statutes Involved	3
Statement Of The Case	3
Reasons For Granting The Writ	7
I.	
State Regulation Of Airport Operations Through Imposition Of Repetitive Nuisance Liability Violates The Supremacy Clause As Applied By This Court In *City of Burbank v. Lockheed Air Terminal, Inc.*	11
A. State Regulation Of Aircraft Noise Is Preempted	11
B. The Imposition Of Perpetual Nuisance Liability By State Courts Upon Airport Operators For Decisions Affecting Aircraft Noise Is A Prohibited Form Of Regulation	14
C. The Holding Below Is Contrary To The Decision In *City Of Burbank* And Inconsistent With The Only Other Federal Court Decision On The Issue	18
II.	
State Regulation Of Airport Operations Through Imposition Of Repetitive Nuisance Liability On Airport Proprietors Will Result In An Undue Burden On Interstate Commerce In Violation Of The Commerce Clause	21

Page

A. State Commerce Regulations May Not Impose An Undue Burden On Interstate Commerce 21

B. Imposition Of Nuisance Liability On Airport Proprietors By California Courts Would Constitute An Undue Burden On Interstate Commerce 22

Conclusion 26

INDEX TO APPENDICES

Appendix A. Opinion Of California Supreme Court Below A-1

Appendix B. Opinion Of California Court Of Appeal Below A-21

Appendix C. Order Of Los Angeles County Superior Court Below A-51

TABLE OF AUTHORITIES CITED

Cases

Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 17

Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 15, 16

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) ..... i, 3, 4, 6, 7, 9, 10, 11, 12, 13, 16, 18, 19, 20, 21, 25, 26

Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) 22, 23, 24

Greater Westchester Homeowners Association v. Los Angeles, 26 Cal.3d 86, 603 P.2d 1329, 160 Cal.Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980) 10, 19

Griggs v. County of Allegheny, 369 U.S. 857 (1962) 25

Hines v. Davidowitz, 312 U.S. 52 (1941) 11

Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975) 3, 10, 20, 26

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 9

Partee v. San Diego Chargers Football Co., 34 Cal.3d 378, 668 P.2d 674, 194 Cal.Rptr. 367 (1983) 24

Phillips v. City of Pasadena, 27 Cal.2d 104, 496 P.2d 480 (1945) 5

Pike v. Bruce Church, 397 U.S. 137 (1970) 21, 22, 25

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 11

Table of Authorities Cited

Cases

	Page
San Diego Building Trades Council, Local 2020 v. Garmon, 359 U.S. 236 (1959)	9, 15, 16, 17
Spaulding v. Cameron, 38 Cal.2d 265, 239 P.2d 625 (1952)	5
Sperry v. Florida ex rel. The Florida Bar, 373 U.S. 379 (1963)	17
Southern Pacific Company v. Arizona, 325 U.S. 761 (1945)	21, 22, 23, 24

Constitution

United States Constitution, Art. I, Sec. 8	3
United States Constitution, Art. VI	3

Statutes

Airline Deregulation Act of 1978, Pub. L. 85-726, § 105, 92 Stat. 1708, 49 U.S.C.A. § 1305 (West Supp. 1984)	13
Aviation Noise Abatement Policy, November 18, 1976, reprinted in Noise Regulation Reporter (BNA) (Ref. File), 51:1002	12
California Code of Civil Procedure, Sec. 731a (West 1980)	19
California Government Code, Sec. 911.2 (West 1980)	4
California Public Resources Code, Sec. 21001 *et seq.*	13
California Government Code, Sec. 6500	i
California Government Code, Sec. 6546.1	i
Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 101 et seq., 72 Stat. 740, 49 U.S.C.A. § 1301 (West, 1976)	11

TABLE OF AUTHORITIES CITED

STATUTES

	Page
Noise Control Act of 1972, Pub. L. No. 92-574, § 7(a), 86 Stat. 1234, 49 U.S.C.A. § 1431 (1976)	11
United States Code, Title 28, Sec. 1257(3)	2

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KENNETH L. BAKER, *et al.*,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Burbank-Glendale-Pasadena Airport Authority, a California joint powers agency and owner of the Burbank-Glendale-Pasadena Airport, prays that a Writ of Certiorari issue to the Supreme Court of the State of California to review that court's decision in case No. 31869, entitled *Baker, et al. v. Burbank-Glendale-Pasadena Airport Authority.*

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, 39 Cal.3d 862, 705 P.2d 866, 218 Cal.Rptr. 293

(1985), is set forth in Appendix A at page A-1. The opinions of the Court of Appeal of the State of California, Second Appellate District, 149 Cal.App.3d 872, 197 Cal.Rptr. 357 (1983) (not officially reported), and the unreported memorandum opinion of the Superior Court for the County of Los Angeles are set forth in Appendices B and C at pages A-21 and A-51, respectively.

In relevant part, the California Supreme Court held that federal preemption of local regulation of airport noise does not bar plaintiffs from bringing successive nuisance damage actions against California airports for personal injury, emotional distress and property damage until the nuisance created by jet aircraft operations is abated. Holding that airport operations are continuing, rather than permanent, nuisances, the court concluded that such damage actions are not barred by otherwise applicable statutes of limitation.[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The decision of the California Supreme Court was entered on September 23, 1985, and this Petition for Certiorari has been filed less than 90 days thereafter.

Review by certiorari is sought on the grounds that the California Supreme Court has decided substantial questions arising under the United States Constitution and federal statutes involving the application of this Court's

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[1]The court also held that, notwithstanding California legislation prohibiting the Airport Authority from exercising the power of eminent domain to condemn residential real property, the Airport Authority could concurrently be sued for inverse condemnation, a ruling which is not contested in this Petition.

decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), in a manner contrary to the principles announced in that decision and in conflict with the only federal court that has faced similar issues. *See Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3:

> "The Congress shall have power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

STATEMENT OF THE CASE

The Airport Authority, Petitioner here, is the owner and operator of the Burbank-Glendale-Pasadena Airport ("Burbank Airport"), a major public air transport facility serving approximately 2.8 million passengers annually in interstate and intrastate commerce. Burbank Airport (then known as the Hollywood-Burbank Airport) was the

subject of this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

In 1982, twenty-four individuals residing in the vicinity of Burbank Airport initiated this action against the Airport Authority sounding in inverse condemnation and nuisance.[2] Plaintiffs alleged that noise and other by-products created by the operation of jet aircraft using Burbank Airport had injured them. They sought $100,000 each for personal injuries and emotional distress, and $100,000 per residence for property damage.

The Airport Authority demurred to plaintiffs' nuisance claims on the ground that, on the face of the complaint, the claims were barred by the statutes of limitation applicable to personal injury and property damage claims against public entities. *See* Cal. Gov't. Code § 911.2 (West 1980). The trial court sustained the demurrer and plaintiffs appealed.

On December 14, 1983, the California Court of Appeal held that because, in its view, airports could voluntarily abate those jet aircraft operations deemed to constitute a nuisance, plaintiffs could "elect" to treat the nuisance as "continuing" rather than "permanent". As a consequence, airport noise plaintiffs were permitted to sue the airport repeatedly until the nuisance subsides or is abated and thus could write their own immunity from the statutes of limitation.[3]

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[2]A companion case, *Blaine, et al. v. Burbank-Glendale-Pasadena Airport Authority, et al.*, involving identical claims on behalf of 308 plaintiffs, is also pending against Petitioner.

[3]Under California law, as under the law of most jurisdictions, if a nuisance is considered permanent, plaintiffs must collect all of their damages, past, present and future, in one action. The statutes of limitation applicable to such claims begin to run at the inception of

The Airport Authority appealed to the California Supreme Court, which granted review on February 16, 1984. On September 23, 1985, that court followed and expanded upon the Court of Appeal's analysis, holding that "[a]irport operations are the quintessential continuing nuisance," 39 Cal.3d at 873, entitling persons allegedly harmed by them to "bring successive actions for damages until the nuisance is abated." *Id.* at 869.

The California Supreme Court specifically ruled on the federal preemption issue when it affirmed the holding of the Court of Appeal. It concluded that while certain public utilities must be considered permanent nuisances because they are privileged to continue to operate despite their interference with others' property rights, 39 Cal.3d at 872, California airports were *not* such entities and were *not* protected by federal preemption:

> "We do not deal with such an extensive privilege. Federal preemption of local regulation of airport noise is not absolute. In *Greater Westchester*, . . . 26 Cal.3d 86, we concluded that federal preemption does not operate to wholly eliminate local responsibility for airport noise control. We based this conclusion, in part, on the distinction drawn by the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal*, (1973) 411 U.S. 624, between a municipality's exercise of the police power and its proprietary efforts to reduce airport noise. Federal law

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the nuisance. *See, e.g., Phillips v. City of Pasadena*, 27 Cal.2d 104, 107, 496 P.2d 480 (1945). In contrast, if a nuisance is deemed continuing, plaintiffs may bring successive actions to collect damages periodically for harm suffered during the period specified in the applicable statutes of limitation. *See, e.g., Spaulding v. Cameron*, 38 Cal.2d 265, 267-68, 239 P.2d 625 (1952). Consequently, under a continuing nuisance theory, plaintiffs have a new cause of action for each day they allege that an activity is a nuisance.

> preempts only the former. (*Id*, at pp. 635-636, fn. 14; *Greater Westchester*, . . . 26 Cal.3d at p. 96. *See also San Diego Unified Port Dist. v. Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1314, *cert. den.* 455 U.S. 1000.) The message of *City of Burbank* and *Greater Westchester* is clear: state law damage remedies remain available against an airport proprietor despite the fact that federal law precludes interference with commercial flight patterns and schedules."

39 Cal.3d at 872.

The California Supreme Court's ruling in this case was based squarely upon its interpretation of federal law. The scope of federal preemption and its effect on local attempts at aircraft noise regulation are clearly federal questions, decided in part in *City of Burbank*, 411 U.S. 624 (1973).[4] In the decision below, the California Supreme Court interposed its own restrictive interpretation of federal preemption and broadened the scope of permitted state intrusion into air transit regulation.

A sensitive issue of national transportation policy such as the one presented here should properly be decided by this Court in order to insure uniformity of application throughout the states and to guarantee that the national interest in promoting interstate commerce is not thwarted by parochial state and local concerns.

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[4]*City of Burbank* left open the question of the scope of a proprietor's authority to adopt noise control measures. *Id.* at 635 n.14. The scope of a state's authority to interfere with airport operations through the judicial imposition of nuisance judgments upon the airport proprietor was not at issue in that case and has not been decided by this Court.

REASONS FOR GRANTING THE WRIT

By the decision below, the California Supreme Court has overruled *sub silentio* this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), which held that the operation of public airports accommodating commercial jet aircraft, and the noise by-products of jet aircraft, were not subject to local regulation. In that case, this Court found that the delicate balance between air safety, efficiency and noise abatement mandated a uniform and exclusive system of federal regulation of aircraft noise, 411 U.S. at 638-39, and that local regulation of airport operations aimed at controlling jet aircraft noise was thus preempted by federal law. 411 U.S. at 633.

The California Supreme Court decision effectively ignores this prohibition against local noise regulation. While paying lip service to the principle that the state is powerless to enjoin aircraft operations at the behest of homeowners in adjacent communities, the court has fashioned a system of perpetual tort liability to achieve the same result indirectly. Under the California Supreme Court's decision, airports have been sentenced to a Hobson's choice of absorbing repeated and costly challenges to airport operational decisions or submitting to the parochial demands of local residents to the detriment of the larger public good and safety.

Based upon what the court declared to be an airport proprietor's "separate duty to reduce noise," 39 Cal.3d at 873, the decision below subjects to local scrutiny (and thus to the vagaries of local judicial processes) the very activities that *City of Burbank* held preempted: takeoff and landing procedures, runway preferences and modifications in the number, frequency or scheduling of flights. The decision below gives local residents, through court

action, the right to challenge every decision that might affect noise levels in their community.[5]

That such control-through-litigation was a key object of the decision below is readily acknowledged by the majority:

> "Moreover, we should be particularly cautious not to enlarge the category of permanent nuisances beyond those structures or conditions that truly are permanent. Where some means of abatement exists, there is little or no incentive to make remedial efforts once the nuisance is classified as permanent. Such a result is at odds with tort law's philosophy of encouraging innovation and repair to decrease future harm."

39 Cal.3d at 872.

> "Thus, despite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or other noise reducing devices."

39 Cal.3d at 873.[6]

The predictable consequence of this new right to punish, and thus regulate, airport operational deci-

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[5]The record below reflects the recent use of collective, repetitive court actions by homeowners to attempt to force operational changes at San Francisco International Airport by "nuisancing the airport to death." *See* Amicus Brief of City and County of San Francisco at page 2.

[6]Because the decision below arose from the trial court's sustaining of a demurrer to the complaint, the court reached well beyond the record to opine regarding the Airport Authority's legal or practical ability to undertake further noise-reduction measures.

sions — irrespective of whether those decisions are imposed upon airports by the federal government or initiated by the proprietor — will be a continuous wave of lawsuits as local residents attempt to pressure airports to divert noise away from them and onto their neighbors, or to reduce noise by lessening service.[7] Preemption doctrine is made no less applicable, however, because the method of regulation chosen by the state is economic coercion through tort liability. *See San Diego Building Trades Council, Local 2020 v. Garmon,* 359 U.S. 236 (1959).

Thus, the inherent vice of the decision below lies in both the ends sought and the means selected by the court. The control and management of aircraft noise is a uniquely national issue since noise and safety (like aircraft and airports) are inextricably linked in a nationwide matrix. *City of Burbank,* 411 U.S. 624, 633-34 (1973), *citing Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303 (1944). The proper balance cannot be struck by a system that pits airports against homeowners in endless local scrimmages before local juries over the wisdom of decisions affecting flight operations and, consequently, noise levels. The inevitable result of such local regulation is incompatibility in a system requiring consistency.

This Court has left undecided whether states may impose any nuisance liability on airport proprietors for

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[7]Even before remittitur, the 332 plaintiffs in this and its companion action filed *new* damage claims against the Airport Authority purporting to seek an additional $100,000 each for personal injury and emotional distress, and $100,000 per residence for property damage. These 332 plaintiffs represent only a fraction of the thousands of persons residing within comparable distances from Burbank Airport and a minuscule portion of those living in similar proximity to other California airports.

operational decisions. *See Greater Westchester Homeowners Association v. Los Angeles,* 26 Cal.3d 86, 603 P.2d 1329, 160 Cal.Rptr. 733 (1979), *cert. denied,* 449 U.S. 820 (1980). The holdings of the lower courts are split. *Compare Greater Westchester, supra,* with *Luedtke v. County of Milwaukee,* 521 F.2d 387 (7th Cir. 1975). The decision below, however, clearly exceeds *all* limits which courts have previously placed on the rights of plaintiffs to seek damages against airports for noise.

Regardless of what liability may be imposed on airports for land use or planning decisions having little or no effect upon aircraft operations, the holding below purports to impose unlimited and infinite noise liability upon public airports for engaging in activity that cannot be separated from what is condoned, permitted or required (and clearly preempted) by federal regulation. The decision below thus extends perpetual liability to new classes of activity: those which the proprietor is privileged by federal law to continue and those which cannot be controlled by the proprietor, short of cessation of operations.

Should the new California rule be followed in other jurisdictions, the evils which led this Court to strike down the Burbank airport curfew in *City of Burbank,* will multiply nationwide. The airport which sought protection in 1973 from parochial legislative politics threatening the safety and integrity of the national aviation system must again, in 1985, appeal to this Court to protect air commerce from an equally effective and injurious form of local regulation.

I.

STATE REGULATION OF AIRPORT OPERATIONS THROUGH IMPOSITION OF REPETITIVE NUISANCE LIABILITY VIOLATES THE SUPREMACY CLAUSE AS APPLIED BY THIS COURT IN *CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.*

A. State Regulation Of Aircraft Noise Is Preempted.

The supremacy of federal law in the regulation of aircraft noise was established by this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). In that decision, this Court declared that the Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 101 *et seq.*, 72 Stat. 740, 49 U.S.C.A. § 1301 *et seq.* (West 1976), supplemented by the Noise Control Act of 1972, Pub. L. No. 92-574, § 7(a), 86 Stat. 1234, 49 U.S.C.A. § 1431 (1976), constituted a scheme of federal regulation of aircraft noise so pervasive that Congress left no room for the states to supplement it. *City of Burbank*, 411 U.S. at 633-34, *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The Federal Aviation Administration has "full control over aircraft noise, pre-empting state and local control." *City of Burbank*, 411 U.S. at 633. The complete displacement of traditional state power over noise is mandated by the complex and intricate interdependence between aviation safety, efficiency, noise control, and management of air traffic on a nationwide scale. *Id.*, 411 U.S. at 638-39. Here, as elsewhere, state law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" must be stricken down. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Since this Court's decision in *City of Burbank*, the scope of federal preemption over the nation's aviation system has broadened still further. Three years after *City of Burbank* that trend was reflected in the Department of Transportation's Aviation Noise Abatement Policy, which stated that the role of the federal government was:

> "to control aircraft noise by the regulation of source emissions, by flight operational procedures, and by management of the air traffic control system and navigable airspace in ways that minimize noise impact on residential areas, consistent with the highest standards of safety."

Aviation Noise Abatement Policy, November 18, 1976, reprinted in *Noise Regulation Reporter* (BNA) (Ref. File), 51:1002.

In contrast, the Noise Abatement Policy allocated to state and local governments a narrowly limited responsibility to provide for land use planning and development, zoning, and housing regulation that would limit the uses of land near airports to purposes compatible with airport operations.[8] *Id.*

Additionally, in 1978, Congress expressly denied state and local governments the right to regulate air carriers in the wake of airline deregulation:

> "[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule,

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[8]The Noise Abatement Policy also carefully outlined the scope of an airport proprietor's ability to take steps to reduce noise. The Policy expressly excluded steps that would "unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." *Id.*

> regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation."

Airline Deregulation Act of 1978, Pub. L. 85-726, § 105, 92 Stat. 1708, 49 U.S.C.A. § 1305 (West Supp. 1984).

The Federal Aviation Administration ("FAA") has also recently expressed its view of the broad scope of federal preemption, taking the position that court action aimed at reversing operational decisions of airport proprietors is preempted. In *United States of America v. State of California, et al.*, United States District Court, Eastern District of California, Case No. 85-1600 LKK, filed November 15, 1985, the FAA has alleged that the State of California, by suing airport proprietors under the California Environmental Quality Act (Cal. Pub. Res. Code § 21001 *et seq.*) to limit the number and type of commercial aircraft operations at major California airports, is unlawfully exercising its powers and that such suits are preempted by federal control of aircraft operations and aviation noise.

These actions by Congress and the federal agencies charged with managing the system of commercial aviation evidence the expansion of federal control over jet aircraft and their noise by-products since this Court decided *City of Burbank*. In the face of this development, the California Supreme Court's decision must be struck down.

B. The Imposition Of Perpetual Nuisance Liability By State Courts Upon Airport Operators For Decisions Affecting Aircraft Noise Is A Prohibited Form Of Regulation.

The court below found that "[a]irport operations are the quintessential continuing nuisance," 39 Cal.3d at 873, entitling persons allegedly harmed by it to "bring successive actions for damages until the nuisance is abated." *Id.* at 869. Although purporting formally to recognize federal preemption of local regulation (including court-ordered injunctive relief) of airport noise, *id.* at 868 n.6, 872, the court nevertheless ruled that state law damage remedies premised on nuisance liability are available against airport proprietors, and continuing damages recoverable until the nuisance is abated, "despite the fact that federal law precludes interference with commercial flight patterns and schedules." *Id.* at 872. In clear effect, the court held that while the State of California could not directly interfere with decisions of an airport proprietor affecting flight operations, it could impose damages upon him until the desired decisions are implemented "voluntarily".

For the same reasons that a state cannot impose noise regulations upon airport proprietors directly through its police powers or indirectly through court ordered injunction, a state cannot impose noise regulation indirectly through the economic coercion of repeated damages actions. As the court below explicitly acknowledged, the intended purpose of repeated damages actions is to force airport proprietors to adopt various measures to reduce noise. *Id.* at 869, 872. Those decisions, however, are solely within the province of the Federal Aviation Administration working in conjunction with the airport proprietor, and may not be the subject of second-guessing by local residents or local courts.

Invalidation of state tort laws imposing liability in fields where the federal government has preempted state interference with decisions of the putative tortfeasor is not novel. Decisions of this Court recognize that the *form* of state action — whether legislative or judicial, or premised upon general tort or specific regulatory law — is not a litmus test of its propriety. Rather, the rule long established by this Court is that state tort liability that breaches a preemptive federal policy is as repugnant to the supremacy clause as direct regulation. *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) ("*Kalo Brick*"); *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1951).

In the *Kalo Brick* case, a railroad was given permission by the Interstate Commerce Commission ("ICC") to abandon a route serving plaintiff's business. Plaintiff subsequently sued the railroad in tort for the harm caused his business by the cessation of rail service. This Court found that ICC review and approval of the railroad's abandonment application preempted the state court from imposing tort liability on the railroad for the decision. *Kalo Brick*, 450 U.S. at 328-29.

The rationale expressed by the court below for imposing nuisance liability on the Airport Authority notwithstanding the preemptive effect of federal regulation is that such liability does not conflict with federal law because it is predicated upon a proprietor's right voluntarily to control airport operations. 39 Cal.3d at 872-73. Plaintiff in *Kalo Brick* made the same argument — that state tort liability would be consistent with and "complementary" to federal regulation of railroad service — but this Court flatly dismissed that notion as inconsistent with the authority vested in the ICC:

> "The judgment as to what constitutes reasonableness belongs exclusively to the Commission. *Cf. Purcell v. U[illegible]ates*, 315 U.S., at 384-385, 62 S.Ct., at 710-7[illegible] would vitiate the overarching congressional intent of creating 'an efficient and nationally integrated railroad system,' *ICC v. Railway Labor Executives Assn.*, 315 U.S. 373, 376-377, 62 S.Ct. 717, 719-720, 86 L.Ed. 904 (1942), to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commissioner is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act."

Kalo Brick, 450 U.S. at 325-326.

As in *Kalo Brick*, the purpose of California's imposition of repetitive nuisance liability here is to control indirectly the discretion of an enterprise engaged in interstate transportation. Also as in *Kalo Brick*, the effect of tolerating such liability rules would be to foster interference with federal policy for, as *City of Burbank* pointed out, the interdependence of noise, safety and efficiency "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *City of Burbank*, 411 U.S. at 639.

State court damage remedies were also held to be preempted in *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, an employer brought a state tort action against several unions attempting to organize plant employees. Plaintiff argued that the union's activities were neither protected

nor prohibited by the National Labor Relations Act. *Id.* at 246.

This Court held in *Garmon* that the state could not assume jurisdiction over plaintiff's claims unless the National Labor Relations Board declared that it lacked jurisdiction over the issues, noting that "[t]he governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246 (footnote omitted).

The Court made it clear that the imposition of damages by a state court was as intrusive as overt state regulation or judicial injunction:

> "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief."

Id. at 246-247.

Other cases decided by this Court also embrace the rule that imposition of damages by the state violates the supremacy clause if direct regulation of the underlying conduct would also be preempted. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82, 584 (1981) (imposition of contract damages based on a finding that the Federal Energy Regulatory Commission would have found a higher sales price reasonable is a usurpation of federal authority tantamount to direct regulation); *Sperry v. Florida ex rel. The Florida Bar*, 373 U.S. 379, 403 (1963) (patent agent not subject to rules relating to

the unauthorized practice of law since "the authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature").

C. The Holding Below Is Contrary To The Decision In *City Of Burbank* And Inconsistent With The Only Other Federal Court Decision On The Issue.

The decision below reasoned that "[f]ederal preemption of local regulation of airport noise is not absolute" because preemption extends only to a municipality's exercise of the police power and not to an airport proprietor's own efforts to reduce noise. 39 Cal.3d at 872. Having created this basis for a proprietor's "separate duty to reduce noise", *id.* at 873, the court allowed residents in communities adjacent to airports to bring successive actions for damages, premised on a continuing nuisance theory, until the proprietor abates the noise. *Id.* at 869.

The conflict between this decision and *City of Burbank* is readily apparent: the decision below purports to expose airport proprietors to continuing nuisance liability for the full panoply of aircraft operations which produce noise, even though most aspects of aircraft operational decisions can neither be controlled by the airport proprietor nor enjoined by a court. The airport proprietor is thus left with the choice of ceasing all operations, absorbing continuing liability or submitting to a state court's judgment of what noise abatement procedures are reasonable.

The use of continuous damages liability to coerce enactment of noise control measures desired by local residents (and which the state could not otherwise mandate) cannot be sanctioned through resort to a fiction that the state is doing something other than regulating aircraft operations. Conducting nuisance trials will inexorably lead

courts and juries to rule on the reasonableness of traffic patterns, aircraft operational procedures, or curfews, all of which were held preempted from state regulation in *City of Burbank*. 411 U.S. at 639.[9]

The authorities cited in the opinion below provide no basis for excepting local regulation of airport proprietors' operational decisions from the scope of federal preemption. The only authority found by the court below was its own decision in *Greater Westchester Homeowners Association v. Los Angeles*, 26 Cal.3d 86, 108, 603 P.2d 1329, 160 Cal.Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980) (holding that the decision of the proprietor of Los Angeles International Airport to build new runways would subject the proprietor to nuisance liability). However, the court in *Greater Westchester* justified such liability by noting that *City of Burbank* had expressly reserved the issue of a *proprietor's* powers to enact noise control measures.[10] *Greater Westchester*, 26 Cal.3d at 95-98.

Nothing in *City of Burbank* suggests that nuisance liability is not a form of state regulation. The case clearly

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[9]The inevitability of an inquiry into the reasonableness of aircraft operations and noise control measures results from the nature of an action for nuisance and the defenses available to the airport proprietor. Under California law, an airport cannot be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. *See* Cal. Civ. Proc. Code § 731a (West 1980).

[10]Furthermore, the California Supreme Court in *Greater Westchester* confined its holding to liability arising out of airport planning, design, and land use decisions over which the airport proprietor retained "substantial proprietary control". 26 Cal.3d at 97. The decision below embodies no such limitations, suggesting that a proprietor will be liable in nuisance regardless of whether it is within the power of the proprietor to control the noise complained of without interfering with operational procedures within the exclusive control of the federal government.

held that the state *quo* regulator was preempted from imposing noise regulations on airport proprietors. *City of Burbank,* 411 U.S. at 640. *City of Burbank* thus provides no justification for the imposition of continuous nuisance liability on airport operators since the decision below imposes such liability as state *regulator,* not as airport proprietor.

This Court has held that decisions concerning flight patterns, takeoff and landing procedures, curfews and modifications in the number, frequency or scheduling of flights, among others, cannot be the subject of parochial regulations. *City of Burbank,* 411 U.S. at 636-39. The decision below clearly permits (and is predicated on the expectation of) state interference with such activities through the imposition of nuisance liability. The effectiveness of this mode of state regulation is undeniable. In order to avoid the continuous expense of litigation and damage awards, airport proprietors will be forced to enact the very measures this Court declared would upset the delicate balance between safety and efficiency that mandated the exclusion of locally imposed noise regulation.

The decision of the California Supreme Court is also inconsistent with the only federal appeals court decision applying the holding of *City of Burbank* to a nuisance action. The United States Court of Appeals for the Seventh Circuit, in *Luedtke v. County of Milwaukee,* 521 F.2d 387, 391 (7th Cir. 1975), held that state-imposed nuisance liability was preempted by *City of Burbank.* The court in *Luedtke* found that an airport proprietor could not be held liable for negligence or for creating a nuisance if airport operations were in compliance with federal laws and regulations. 521 F.2d at 391. Thus, *Luedtke* held unlawful the exact regulatory scheme the California Supreme

Court has established. Such a decisive split over the scope of *City of Burbank's* preemption ruling should not be allowed to fester.

II.

STATE REGULATION OF AIRPORT OPERATIONS THROUGH IMPOSITION OF REPETITIVE NUISANCE LIABILITY ON AIRPORT PROPRIETORS WILL RESULT IN AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. State Commerce Regulations May Not Impose An Undue Burden On Interstate Commerce.

The commerce clause of the Constitution vests in Congress the power to regulate commerce between the states. State regulations are precluded even where Congress has not acted if they are deemed to interfere with interstate commerce. *Southern Pacific Company v. Arizona,* 325 U.S. 761, 769 (1945). State regulations are evaluated on the basis of a balancing test weighing the "legitimate local public interest" underlying them against the burden they impose on interstate commerce. *See Pike v. Bruce Church,* 397 U.S. 137, 146 (1970) (striking down an Arizona restriction barring the shipment of uncrated cantaloupes out of that state). *Bruce Church* indicates the kind of interest balancing that goes into commerce clause decisions:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement Co. v. Detroit,* 362

> U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

397 U.S. at 142.

B. Imposition Of Nuisance Liability On Airport Proprietors By California Courts Would Constitute An Undue Burden On Interstate Commerce.

As the court below readily acknowledges, the purpose of imposing continuing nuisance liability on California airport proprietors is not simply to compensate residents for damages, but also to encourage the imposition of "remedial" noise control measures. 39 Cal.3d at 872. The pernicious effects on interstate commerce of the avowedly regulatory component of the decision below closely resemble the effects found to violate the commerce clause in key decisions of this Court. *See Southern Pacific,* 325 U.S. 761; *Flood v. Kuhn,* 443 F.2d 264 (2d Cir. 1971), *aff'd,* 407 U.S. 258 (1972).

In the *Southern Pacific* decision, Arizona's regulations limiting the length of trains for the purpose of increased rail safety were struck down. The regulations at issue in *Southern Pacific* required that trains passing through Arizona be broken up and reformed, which had the practical effect of applying Arizona's train length limitation throughout the southwest rail corridor. 325 U.S. at 774-75. This Court noted that if each state could impose length limitations on trains, rail carriers would be required either to break up and reform their trains at each state border or conform their operations to the most

stringent length restriction imposed along the route. *Id.* at 773. Either alternative was unacceptable because of the possibility of states enacting conflicting regulations where uniformity was essential and because of the burden imposed on interstate commerce by the Arizona regulations. *Id.* at 773-75.

Just as the train length limitation struck down in *Southern Pacific* was held to burden interstate commerce because of the prospect that other states would adopt similar regulations, California's attempt to regulate local airport noise through the imposition of nuisance liability creates a burden on interstate air transportation. Also, as in *Southern Pacific,* the commerce that California has attempted to regulate through the decision below is essentially interstate in nature and is accordingly entitled to protection from overreaching state regulation.

Air carriers, required to comply with noise rules adopted by Burbank Airport (or at any of the other major airports in California) in order to avoid or mitigate nuisance liability, will have to make adjustments in their schedules, equipment or operating procedures that will have effects throughout their interstate route structure. The impact on interstate commerce from such regulation will escalate exponentially should other states follow California's example in using the crude instrument of nuisance liability to force airport proprietors to reduce noise.

The fact that California has eschewed a more direct approach at regulation in favor of imposing nuisance liability on airport operators does not change the commerce clause analysis. *See Flood v. Kuhn,* 443 F.2d 264 (2d Cir. 1971), *aff'd,* 407 U.S. 258 (1972). In *Flood,* a baseball player challenged the structure of national major league baseball, asserting state antitrust and common law

causes of action. The claims were dismissed because such actions would place an undue burden on interstate commerce. 443 F.2d at 268. This Court reasoned that awards of monetary damages under state antitrust and common law theories against the baseball league would result in enforcement of the "strictest standard of several states" and have an extra-territorial effect "considerably more far-reaching than that in *Southern Pacific*." *Id.* at 268. *Accord, Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378, 385, 668 P.2d 674, 194 Cal.Rptr. 367 (1983) (commerce clause prohibits imposition of state antitrust damages on professional football team due to the need for national uniformity in player-team-league relationships).

Flood teaches that enforcement of state laws imposing damages are as violative of the commerce clause as direct regulation where the effect of the damages award will be to burden interstate commerce unreasonably. Commercial aircraft operations are, *a fortiori,* activity in interstate commerce. Regulation at one point within the network of air transportation will affect the entire system. To permit nuisance liability for jet aircraft noise in one state is to permit that state's noise rule to govern air commerce in the other states. As *Southern Pacific* and *Flood* illustrate, such regulation is consistently struck down as unduly burdensome on interstate commerce.

While imposition of nuisance damages would constitute a serious burden on interstate commerce, the State of California can claim no significant countervailing interest justifying the intrusion. In *Southern Pacific,* the state's safety claims were of doubtful validity. 325 U.S. at 775-76. In *Flood,* the court considered enforcement of state antitrust laws to be of little comparative importance. 443 F.2d at 268. In the present case, the state interest is to compensate landowners for damages resulting from the

exposure of their property to the by-products of commercial jet aircraft operations and to reduce the effects of noise on airport neighbors. It is well established, however, that the state has little permissible interest in the regulation of aircraft noise. *City of Burbank*, 411 U.S. at 639-40. Moreover, any interest the state may have in providing a continuing nuisance remedy to its residents is extremely limited given the availability of an inverse condemnation action. *See Griggs v. County of Allegheny*, 369 U.S. 857 (1962).[11]

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[11]The inverse condemnation action is a less intrusive means of protecting property interests. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (court must consider whether state interest "could be promoted as well with a lesser impact on interstate activities"). While inverse condemnation will fully compensate plaintiffs for damage to their property, such liability will not unduly burden interstate commerce because it does not present the specter of "repeated and vexatious litigation," 39 Cal.3d at 874 (dissent), which provides plaintiffs with the opportunity to regulate airport operations through collective court action.

CONCLUSION

Because the court below decided important questions arising under the Constitution and laws of the United States in a manner that is inconsistent with the decision of this Court in *City of Burbank* and with the decision of the Seventh Circuit in *Luedtke v. County of Milwaukee*, the Airport Authority respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of California to review that court's decision in case No. 31869, *Baker, et al. v. Burbank-Glendale-Pasadena Airport Authority.*

Respectfully submitted,

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APPENDIX A

Opinion Of California Supreme Court Below

California Supreme Court.

Kenneth L. Baker, et al., Plaintiffs and Appellants, v. Burbank-Glendale-Pasadena Airport Authority, Defendant and Respondent.

Filed: September 23, 1985.

Appeal From: California Court of Appeal, Second District, Division Four (Civ. No. 69670).

REYNOSO, J. — We are asked to resolve two questions: whether a public entity lacking the power of eminent domain may nonetheless be liable in inverse condemnation; and, whether a plaintiff may elect to treat commercial airport noise and vibrations as a continuing, rather than a permanent, nuisance. For the reasons set forth below, we answer both questions in the affirmative.

Plaintiffs are homeowners who live adjacent to defendant Burbank-Glendale-Pasadena Airport. The airport became a public entity in 1978 when it was purchased by the three cities pursuant to Government Code section 6500 et seq.[1] In 1982, plaintiffs filed suit for inverse condemnation and

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[1]The cities' joint powers agreement was specifically authorized by Government Code section 6546.1, which provides in relevant part: "In the County of Los Angeles, any agency, commission, or board provided for by joint powers agreement entered into by cities pursuant to Article 1 (commencing with Section 6500) of this chapter for the purpose of the acquisition, operation, repair, maintenance, improvement and administration of the Hollywood-Burbank Airport as a public airport, pursuant to the Federal Aviation Act of 1958, as amended, may carry out such purpose and may authorize the issuance

nuisance caused by noise, smoke, and vibrations from flights over their homes. The trial court sustained demurrers to both causes of action, dismissing the inverse condemnation action because defendant is prohibited by statute from exercising the power of eminent domain, and dismissing the nuisance action as barred by the statute of limitations covering permanent nuisances. Plaintiffs appeal.

1. Inverse Condemnation

Defendant contends that because "inverse condemnation" is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted" (*United States* v. *Clarke* (1980) 445 U.S. 253, 257) [63 L.Ed.2d 373, 377, 100 S.Ct. 1127], it should follow that if an entity lacks the power to condemn by eminent domain, it cannot be liable in inverse condemnation. Indeed, there is some authority for this mechanical view. (3 Nichols on Eminent Domain (3d ed. 1981) § 8.1 [4], p. 8-39; *Jacobson* v. *Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, revd. on other grounds *sub nom., Lake Country Estates v. Tahoe Planning Agcy.* (1979) 440 U.S. 391 [59 L.Ed.2d 401, 99 S.Ct. 1171]; *Western Internat'l Hotels* v. *Tahoe Reg. Plan. Agcy.* (D. Nev. 1975) 387 F.Supp. 429, 439; *Gregory* v. *City of New York* (S.D.N.Y. 1972) 346 F.Supp. 140, 143; *Ex Parte Carter* (Ala. 1980) 395 So.2d 65, 67; *Collopy* v. *Wildlife Com'n, etc.* (Colo. 1981) 625 P.2d 994, 1005; cf. *McCor-*

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of revenue bonds, pursuant to this article, to pay for acquiring, repairing, improving, financing and refinancing such project, including all facilities and improvements and all expenses incidental thereto or connected therewith . . ."

mick v. *Penna. Public Utility Com'n* (1980) 48 Cmwlth. Ct. 384 [409 A.2d 962, 964].) As defendant is prohibited from exercising eminent domain power,[2] it therefore contends that it cannot be subject to suit for inverse condemnation.

These authorities are not controlling. They fail to recognize that the term, "inverse condemnation," describes an action grounded not on statutory condemnation power, but on the constitutional proscription against the taking (U.S. Const., 5th Amend.) or the taking or damaging (Cal. Const., art. I, § 19) of property for public use without just compensation. A landowner

[39 Cal.3d 867]

whose property has been invaded by a public entity that lacks eminent domain power suffers no less a taking merely because the defendant was not authorized to take.

We have previously recognized the constitutional basis of an inverse condemnation action. In *Rose* v. *State of California* (1942) 19 Cal.2d 713 [123 P.2d 505], we held that mere failure of the Legislature to enact a statute

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[2]Government Code section 6546.1 provides in part that defendant "shall not authorize or permit . . . the purchase of fee title to condemned real property zoned for residential use . . ." Moreover, we cannot agree with plaintiffs that Public Utilities Code section 21652 authorizes defendant to take by condemnation the air space easements at issue here. Although that section recognizes air space easements may be acquired by condemnation when "neesssary to permit imposition . . . of excessive noise, [or] vibration . . . due to the operation of aircraft to and from the airport" (*id.*, subd. (a)(2)), the section also specifies that only persons "*authorized* to exercise the power of eminent domain" may acquire such air space easements. (*Id.*, subd. (a); italics added.) This section, therefore, cannot be construed as granting to defendant the power of eminent domain to take the subject easements.

authorizing an inverse condemnation suit did not entitle the state to disregard the constitutional imperative; we therefore allowed the action even though the state had not consented to be sued. (*Id.*, at pp. 719-723.) Similarly, the court in *Sutfin* v. *State of California* (1968) 261 Cal.App.2d 50 [67 Cal.Rptr. 665], held that liability in inverse condemnation did " 'not depend upon a showing that there is statutory authority in the defendant entity to exercise affirmative eminent domain powers to accomplish the same result. All that is necessary to show is that the damage resulted from an exercise of governmental power while seeking to promote "the general interest in its relation to any legitimate object of government." ' " (*Id.*, at p. 55) We later explicitly recognized what was implicit in *Rose* and *Sutfin*: "[t]he authority for prosecution of an inverse condemnation proceeding derives from article I, section 19, of the California Constitution . . ." (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 652 [131 Cal.Rptr. 646, 552 P.2d 430].)[3]

We therefore conclude that plaintiffs' inverse condemnation action may be maintained although defendant

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[3]To the same effect, see *McMahan's of Santa Monica* v. *City of Santa Monica* (1983) 146 Cal.App.3d 683, 692-693 [194 Cal.Rptr. 582]; *Sheffet* v. *County of Los Angeles* [1970) 3 Cal.App.3d 720, 732 [84 Cal.Rptr. 11]; *Podesta* v. *Linden Irr. Dist.* (1956) 141 Cal.App.2d 38, 47 [296 P.2d 401]; *Alper* v. *Clark County* (1977) 93 Nev. 569 [571 P.2d 810, 812-813]; see also *Zinn* v. *State* (1983) 112 Wis.2d 417 [334 N.W.2d 67, 76-77]; *Van Dissel* v. *Jersey Central Power & Light Co.* (1981) 181 N.J. Super. 516 [438 A.2d 563, 568]; *Minch* v. *City of Fargo* (N.D. 1980) 297 N.W.2d 785, 789; *Kinzli* v. *City of Santa Cruz* (N.D.Cal. 1982) 539 F.Supp. 887, 896; *Ocean Acres, etc.* v. *Dare Cty. Bd. of Health* (E.D.N.C. 1981) 514 F.Supp. 1117, 1120; cf. *Gordon* v. *City of Warren* (6th Cir. 1978) 579 F.2d 386, 391. See generally Van Alstyne, *Statutory Modification of Inverse Condemnation; The Scope of Legislative Power* (1967) 19 Stan.L.Rev. 727, *passim.*

lacks eminent domain power. (*Fountain* v. *Metro, Atlanta Rapid Transit Authority* (11th Cir. 1982) 678 F.2d 1038, 1043-1045.)[4] As the inverse condemnation claim was filed within the five-year statute of limitations (*Frustruck* v. *City of Fairfax* (1963) 212

[39 Cal.3d 868]

Cal.App.2d 345, 374 [28 Cal.Rptr. 357]), the trial court erred in dismissing this cause of action.[5]

2. *Nuisance*

Plaintiffs' second cause of action alleges that defendant's activities became a nuisance as of January 29,

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[4]The instant case does not involve allegations of unreasonable zoning or regulatory permit activity — the remedy for which, of course, is not an inverse condemnation suit for damages, but declaratory relief or mandamus. (*Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 272-273 [157 Cal.Rptr. 372, 598 P.2d 25].) Clearly, in cases of physical invasion an inverse condemnation action is appropriate. (*Marina Plaza* v. *California Coastal Zone Conservation Com.* (1977) 73 Cal.App.3d 311, 325 [140 Cal.Rptr. 725].)

[5]*United States* v. *Clarke* (1980) *supra,* 445 U.S. 253, does not suggest a contrary result. In *Clarke* the court granted an injunction against a state's continued invasion of a plaintiff's land for use as a road. The court held that the state had no *defense* to the requested injunction on a theory of inverse condemnation; it did not address the question whether the *plaintiff* had a remedy in inverse condemnation.

Defendant's reliance on *City of Los Angeles* v. *Oliver* (1929) 102 Cal.App. 299 [283 P. 298], for the proposition that the constitutional guarantee of just compensation does not require an inverse condemnation remedy so long as a "reasonably efficient remedy remains" (*id.,* at p. 315) is similarly misplaced. *Oliver* concerned only procedures for calculating just compensation after the state exercised its right of eminent domain; it had nothing to do with the right to bring an inverse condemnation action.

1978—the date defendant became a public entity. Because plaintiffs did not file their complaint until 1982, a question arises as to whether their nuisance claim was timely filed. The answer depends on whether the nuisance is characterized as continuing or permanent.

The trial court ruled that because this particular nuisance is not subject to judicial abatement[6] it is a permanent nuisance upon which the statute of limitations (Gov. Code, § 911.2, Code Civ. Proc., §§ 338, subd. 2 and 340) had run at the time plaintiffs filed their claim.

It does not follow, however, that simply because commercial flights operated in compliance with federal law may not be enjoined, the nuisance at issue is a permanent one. Whether a nuisance will be classified as continuing or permanent depends not on the offending party's interest in continuing the nuisance, but on the type of harm suffered. (See *Nestle* v. *City of Santa Monica* (1972) 6 Cal.3d 920, 937 [101 Cal.Rptr. 568, 496 P.2d 480].)

Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where " 'by one act a permanent injury is done, [and] damages are assessed once for all.' " (*Williams* v. *Southern Pacific R.R. Co.* (1907) 150 Cal. 624, 626

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[6]"[C]ommercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law." (*Greater Westchester Homeowners Assn.* v. *City of Los Angeles* (1979) 26 Cal.3d 86, 94 [160 Cal.Rptr. 733, 603 P.2d 1329]; see also *Loma Portal Civic Club* v. *American Airlines, Inc.* (1964) 61 Cal.2d 582, 591 [39 Cal.Rptr. 708, 394 P.2d 548].)

[89 P. 599], quoting *Beronio* v. *Southern Pacific R.R. Co.* (1890) 86 Cal. 415, 421 [24 P. 1093].) The cases finding the nuisance complained of to be unquestionably permanent in nature have involved solid structures, such as a building encroaching upon the plaintiff's land (*Rankin* v. *DeBare* (1928) 205 Cal. 639 [271 P. 1050],[7] a steam railroad operating over plaintiff's land (*Williams, supra,* 150 Cal. 624),[8] or regrade of a street for a rail system (*Eachus* v. *Los Angeles etc. Ry. Co.* (1894) 103 Cal. 614 [37 P. 750]). In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. (*Rankin, supra,* 205 Cal. at p. 641; *Williams, supra,* 150 Cal. at p. 626; *Robinson, supra,* 129 Cal. at p. 11.) The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. (*Eachus, supra,* 103 Cal. at p. 622.)

On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. (*Phillips* v. *City of Pasadena* (1945) 27 Cal.2d 104, 107-108 [162 P.2d 625].) Recovery is limited, however, to actual

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[7]See also *Castelletto* v. *Bendon* (1961) 193 Cal.App.2d 64 [13 Cal.Rptr. 907]; *Troeger* v. *Fink* (1958) 166 Cal.App.2d 22 [332 P.2d 779]; *Bertram* v. *Orlando* (1951) 102 Cal.App.2d 506 [227 P.2d 894, 24 A.L.R.2d 899].

[8]See also *Robinson* v. *Southern Cal. Ry. Co.* (1900) 129 Cal. 8 [61 P. 947].

injury suffered prior to commencement of each action. Prospective damages are unavailable.

The classic example of a continuing nuisance is an ongoing or repeated disturbance, such as the one before us today, caused by noise, vibration or foul odor. (E.g., *Vowinckel* v. *N. Clark & Sons* (1932) 216 Cal. 156, 158 [13 P.2d 733] [vibration, noise and noxious soot, smoke and gases emanating from pottery factory].)[9] Indeed, even more substantial physical invasions of land have been held to be continuing in character. (E.g., *Tracy* v. *Ferrera* (1956) 144 Cal.App.2d 827, 828 [301 P.2d 905] [deflection of rain water and emission of noxious odors and fumes from neighbor's pipes and furnace].)[10] As emphasized in *Tracy,* the distinction to be drawn is between

[39 Cal.3d 870]

encroachments of a permanent nature erected upon one's lands, and a complaint made, not of the location of the offending structures, but of the continuing use of such

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[9]See also *Wade* v. *Campbell* (1962) 200 Cal.App.2d 54, 59 [19 Cal.Rptr. 173, 92 A.L.R.2d 966] (noxious smells, disturbing noises, flies and mosquitoes associated with dairy); *Williams* v. *Blue Bird Laundry Co.* (1927) 85 Cal.App. 388, 395 [259 P. 484] (loud noise, offensive odors and heavy black smoke emitted from laundry).

[10]See also *Guttinger* v. *Calaveras Cement Co.* (1951) 105 Cal.App.2d 382, 387 [233 P.2d 914] (emission of dust and gases from cement plant injuring neighbor's cattle); *Bourdieu* v. *Seaboard Oil Corp.* (1941) 48 Cal.App. 429, 436 [119 P.2d 973] (illicit use of facilities on plaintiff's land to process oil and gas); *Collins* v. *Sargent* (1928) 89 Cal.App. 107, 116-117 [264 P. 776] (regular use of exposives in gravel quarry shaking plaintiff's house and throwing gravel upon his land).

structures. (*Id., supra,* 144 Cal.App.2d at p. 828.) The former are permanent, the latter is not.[11]

In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing. (*Spaulding* v. *Cameron* (1952) 38 Cal.2d 265, 268 [239 P.2d 625].) The importance of the plaintiff's election has long been recognized. (*United States* v. *Dickinson* (1946) 331 U.S. 745, 749 [91 L.Ed. 1789, 1794, 67 S.Ct. 1382]; *Kornoff* v. *Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 269-271 [288 P. 2d 507]; *Kafka, supra,* 191 Cal. at p. 752; *Williams, supra,* 150 Cal. at p. 628; *Martinez-Ferrer* v. *Richardson-Merrell, Inc.* (1980) 105 Cal.App.3d 316, 326 [164 Cal.Rptr. 591]; *Tracy, supra,* 144 Cal.App.2d at p. 829; 3 Witkin, Cal. Procedure (3d ed 1985] Actions, § 425, pp. 458-459; Rest. 2d Torts. § 930.) As the United States Supreme Court noted in *Dickinson,* a case in which a landowner sued to recover damages after the government flooded his land, "[i]f suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him — for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim . . . is not a single event; it is continuous." (*Dickinson, supra,* 331 U.S. at p. 749 [91 L.Ed. at p. 1794].)

Another contingency running against the plaintiff is the statute of limitations. In *Spaulding* we expressed concern

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[11]Even solid structures have been considered nuisances where it appeared that the structures could have been removed. (*Phillips, supra,* 27 Cal.2d at p. 107 [city installed barrier blocking access to plaintiff's property]; *Kafka* v. *Bozio* (1923) 191 Cal. 746, 751-752 [218 P. 753] [encroaching structure pushing plaintiff's building out of alignment]; *Strong* v. *Sullivan* (1919) 180 Cal. 331, 334 [181 P. 59] [lunch stand erected daily obstructing plaintiff's property].)

that "if the initial injury is slight and plaintiff delays suit until he has suffered substantial damage and the court then determines that the nuisance was permanent, the defendant may be able to raise the defense that the statute of limitations ran from the time of the initial injury, [Citation.] On the other hand, if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that it will continue [Citations.]" (*Spaulding, supra,* 38 Cal.2d at p. 268.) We then emphasized that "[b]ecause of these difficulties, it has been recognized that in doubtful cases the plaintiff should have an election to treat the nuisance as either permanent or not. [Citations.]" (*Ibid.*)

Defendant contends, however, that this is not a case to which election applies because *Spaulding* separately categorized privileged activity

[39 Cal.3d 871]

nuisances as permanent. Defendants read too much into the *Spaulding* opinion.

Although *Spaulding* contains language suggesting that election is unavailable when the nuisance arises as a result of privileged activity,[12] this isolated aspect of the opinion must be viewed in context. First, the purported

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[12]In discussing the continuing/permanent distinction and the basis of election, the court noted in passing: "The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable

exclusion is dictum only. *Spaulding* did not involve a question of privilege. In *Spaulding,* the defendant, a private landowner, negligently maintained piles of dirt on his property which caused mudslides on the plaintiff's land when it rained. The trial court ordered the nuisance abated but also awarded prospective damages for permanent diminution in the value of plaintiff's property. Thus, the issue was the necessity of election, not whether privilege precluded such election.

Second, *Spaulding's* election discussion is based, in part, on *Phillips, supra,* 27 Cal.2d 104, a case involving "privileged" governmental activity. In *Phillips* we held that even assuming the city could not be required to remove a road block obstructing access to Phillips' property, it could not be said as a matter of law that the gate was a permanent nuisance since it apparently "could have been removed at any time." (*Id.,* at p. 108.) It is difficult to reconcile this case, affirmatively relied upon in *Spaulding,* with an interpretation of the latter as absolutely barring election when privileged activity is at issue. The two opinions are more realistically viewed as focusing the election inquiry on the ability to abate rather than on the possibility of a court order requiring abatement.

Third, public policy militates against defining a nuisance as permanent or continuing on the basis of privilege alone. As noted, the purpose of nuisance law is to provide a means of recovery for harm suffered. The doctrine of election is designed to facilitate just and equitable recovery. Though the traditional remedy of injunctive relief may be unavailable in a given case, the damage suffered is no different than in a case involving identical but nonprivileged activity. Both victims are harmed in the same way,

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damages at once. [Citation.]" (*Spaulding, supra,* 38 Cal.2d at pp. 267-268.)

and both may seek damages for such harm. Where the nuisance is a continuing one, both victims, therefore, should be able to bring successive actions as dam-

[39 Cal.3d 872]

ages accrue. To hold that the statute of limitations applies to one continuing nuisance but not the other is to put the burden on the victim to choose his or her tortfeasor wisely. Nuisance law neither requires nor supports such a harsh result.

Moreover, we should be particularly cautious not to enlarge the category of permanent nuisances beyond those structures or conditions that truly are permanent. Where some means of abatement exists, there is little or no incentive to make remedial efforts once the nuisance is classified as permanent. Such a result is at odds with tort law's philosophy of encouraging innovation and repair to decrease future harm.

Finally, the privilege alluded to in *Spaulding* is quite different from the privilege claimed in the present case. In a word, the *Spaulding* privilege is absolute. *Spaulding* referred to an "offending structure or condition [] maintained as a necessary part of the operations of a public utility" as a clear permanent nuisance, "[*s*]*ince the utility by making compensation is entitled to continue them.*" (*Id.*, 38 Cal.2d at p. 267.) (Italics added.)

We do not deal with such an extensive privilege. Federal preemption of local regulation of airport noise is not absolute. In *Greater Westchester, supra,* 26 Cal.3d 86, we concluded that federal preemption does not operate to wholly eliminate local responsibility for airport noise control. We based this conclusion in part, on the distinction drawn by the United States Supreme Court in *City of*

Burbank v. *Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854], between a municipality's exercise of the police power and its proprietary efforts to reduce airport noise. Federal law preempts only the former. (*Id.*, at pp. 635-636, fn. 14 [36 L.Ed.2d at pp. 554-555]; *Greater Westchester, supra,* 26 Cal.3d at p. 96. See also *San Diego Unified Port Dist.* v. *Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1314, cert. den., 455 U.S. 1000 [71 L.Ed.2d 866, 102 S.Ct. 1631].) the message of *City of Burbank* and *Greater Westchester* is clear: state law damage remedies remain available against an airport proprietor despite the fact that federal law precludes interference with commercial flight patterns and schedules.

Moreover, recovery is not limited to damages for permanent nuisance only. In *Greater Westchester* we affirmed damage awards totalling $86,000 for personal injuries sustained during the period 1967-1975 by persons living near Los Angeles International Airport. (*Id.*, 26 Cal.3d at p. 92.) Although we did not otherwise identify the nuisance as permanent or continuing, the time frame given strongly suggests the latter.

[39 Cal.3d 873]

The airport operator's separate duty to reduce noise, and hence, separate nuisance liability, is particularly compelling in the present case. Defendant is a public entity charged with responsibility for the "acquisition, operation, repair, maintenance, improvement and administration" of the airport as a public airport. (Gov. Code, § 6546.1.) Not only does defendant play a proprietary role in the airport's operations, but it is expressly required by statute to make all reasonable efforts to curb noise pollution at the airport. "In operating the airport,

the separate public entity . . . shall not permit or authorize any activity in conjunction with the airport which results in an increase in the size of the noise impact area . . . and shall further comply with the future community noise equivalent levels prescribed by [the California Administrative Code]. . . . [¶] In addition, the entity shall diligently pursue all reasonable avenues available to insure that the adverse effects of noise are being mitigated to the greatest extent reasonably possible." (*Ibid.*) Thus, despite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or other noise reducing devices. The privilege is not absolute.

Airport operations are the quintessential continuing nuisance. Although federal law precluding interference in any way with flight patterns and schedules adds an element of permanency to an otherwise continuing problem, it does not mandate that the overall nuisance is a permanent one. Thus plaintiffs may elect whether to treat airport noise and vibrations as a continuing or as a permanent nuisance.

Because plaintiffs elected to treat the airport as a continuing nuisance, we conclude that the statute of limitations does not bar their nuisance claims.

For the foregoing reasons, the judgment is reversed as to both causes of action.

Bird, C. J., Kaus, J., Broussard, J., and Grodin, J., concurred.

MOSK, J., Concurring and Dissenting. — I agree with the majority that plaintiffs may maintain a cause of action for inverse condemnation even though defendant lacks the power of eminent domain.

I am compelled to dissent, however, from their discussion and disposition of the nuisance cause of action. They effectively ignore principles that have guided the courts of this state and other jurisdictions in the task of classifying nuisances, and thus err in concluding that plaintiffs' claim is timely.

[39 Cal.3d 874]

Moreover, they potentially subject this airport to repeated and vexatious litigation based on the same nuisance.

Plaintiffs allege that defendant's activities became a nuisance as of January 29, 1978 — the date defendant became a public entity. If a nuisance is deemed "permanent," a plaintiff must — within the applicable statute of limitations — sue for all past, present, and future damages in one action. If, by contrast, a nuisance is deemed "continuing," a plaintiff may sue only for damages suffered before the action was filed, but he will not be barred from pressing future claims so long as the nuisance continues.

In *Spaulding* v. *Cameron* (1952) 38 Cal.2d 265 [239 P.2d 625], Justice Traynor prescribed the test for determining whether a nuisance is continuing or permanent, and discussed the policy of the law: "In early decisions of this court it was held that it should not be presumed that a nuisance would continue, and damages were not allowed for a decrease in market value caused by the existence of the nuisance but were limited to the actual physical injury suffered before the commencement of the action. [Citations.] The remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred. *Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or the defen-*

dant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were allowed in one action.

"The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once." (*Id.*, at p. 267, italics added.)

Thus, if a use of property alleged to be a nuisance is likely to continue indefinitely because its owner cannot be compelled to abate, the nuisance is deemed permanent and the plaintiff is given a single cause of action for his damages past, present, and future. This test for classifying nuisances as either continuing or permanent turns on whether the nuisance is reasonably abatable. It is the rule followed not only in this state (see, e.g., *Kornoff* v. *Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 269-271 [288 P.2d 507];

[39 Cal.3d 875]

Spaulding v. *Cameron, supra,* 38 Cal.2d at p. 267), but in other jurisdictions as well (see, e.g., *Maloney* v. *Heftler Realty Company* (Fla.App. 1975) 316 So.2d 594, 595; *City of Columbus* v. *Myszka* (1980) 246 Ga. 571, 572 [272 S.E.2d 302]; *Patz* v. *Farmegg Products, Inc.* (Iowa 1972) 196 N.W.2d 557, 562; *Kentland-Elkhorn Coal Company* v. *Charles* (Ky.App. 1974) 514 S.W.2d 659, 664; *Goldstein* v.

Potomac Elec. Power Co. (1979) 285 Md. 673, 688-690 [404 A.2d 1064]; *Drybread* v. *City of St. Louis* (Mo.App. 1982) 634 S.W.2d 519, 520-521; *Rebel* v. *Big Tarkio Drainage Dist.* (Mo.App. 1980) 602 S.W.2d 787, 792-793; *Sundell* v. *Town of New London* (1979) 119 N.H. 839 [409 A.2d 1315, 1320-1321]; *Aguayo* v. *Village of Charma* (1969) 79 N.M. 729, 731 [449 P.2d 331]; *Krueger* v. *Mitchell* (1983) 112 Wis.2d 88, 102-103 [332 N.W.2d 733]). It is also approved by commentators: "But if the nuisance can not be abated, or is such that the court will not enjoin its continuance, all damages must be obtained in one action." (1 Harper & James, The Law of Torts (1956) § 1.30, p. 91.)

Under these principles, the nuisance alleged here must be deemed permanent. First, injunctive relief is not simply inappropriate, it is unavailable. As this court observed in *Greater Westchester Homeowners Assn.* v. *City of Los Angeles* (1979) 26 Cal.3d 86 [160 Cal.Rptr. 733, 603 P.2d 1329], certiorari denied, 449 U.S. 820 [66 L.Ed.2d 22, 101 S.Ct. 77], "commercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law." (*Id.*, at p. 94; see also *Loma Portal Civic Club* v. *American Airlines, Inc.* (1964) 61 Cal.2d 582, 591 [39 Cal.Rptr. 708, 394 P.2d 548].) Second, successive actions are plainly undesirable. As the Supreme Court of Wisconsin recently held in *Krueger* v. *Mitchell*, an airport noise case, "The injured party must . . . present his . . . entire claim for past and future damages in one action. This limitation on such a damage action is necessary in order to protect airport proprietors from repeated and vexatious litigation based on the same nuisance." (112 Wis.2d at p. 103.)

In some cases classification may be doubtful; in such cases, the *Spaulding* court observed, a plaintiff should be allowed to elect whether to treat the alleged nuisance as continuing or permanent. (38 Cal.2d at p. 268.) Recognizing that their claim here would be barred by limitations if the asserted nuisance is characterized as permanent, plaintiffs insist this case is within the class defined in *Spaulding* as "doubtful," and hence that they may avoid the limitations bar by treating the alleged nuisance as continuing.

Spaulding allows such an election only if, inter alia, "the defendant is not privileged to continue the nuisance. . . ." (*Ibid.*) As *Greater West-*

[39 Cal.3d 876]

chester establishes, defendant's use of its property may not be enjoined as a nuisance: there are no allegations that defendant either is not subject to or has failed to comply with federal regulations. (26 Cal.3d at p. 94.) Thus, defendant is privileged to continue the nuisance alleged here.[1]

Nor is defendant's privilege to continue the alleged nuisance diminished by its *ability* to adopt means within its power to mitigate the allegedly offensive noise. Although the federal government has apparently not preempted all facets of noise control (*Greater Westchester, supra*, 26 Cal.3d at pp. 93-100, and authorities cited; Bennett, *Airport Noise Litigation: Case Law Review* (1982) 47 J. Air L. & Com. 449, 464-469; Werlich &

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[1]Since "privileged" in this context merely means not reasonably abatable (see *Spaulding, supra*, 38 Cal.2d at pp. 267-268), the majority's claim to the contrary (*ante*, at pp. 870-872) is manifestly specious.

Krinsky, *The Aviation Noise Abatement Controversy: Magnificent Laws, Noisy Machines, and the Legal Liability Shuffle* (1981) 15 Loyola L.A. L.Rev. 69, 83-91; Comment, *The 1980 Airport Noise Act: Noise Abatement or Just More Noise?* (1981) 14 U.C. Davis L.Rev. 1049, *passim*), it is clear that permissible local regulation may be imposed only by airport *proprietors*, and not by third parties. (See *Bennett, supra*, 47 J. Air L. & Com. at pp. 469-473, and cases cited.) Thus in *City of Burbank* v. *Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854], the United States Supreme Court invalidated a municipal ordinance that purported to regulate noise by imposing a take-off curfew on a privately owned airport. *City of Burbank* plainly establishes that the delicate federal/local-proprietor noise control scheme currently in effect will not tolerate private suits seeking mandatory imposition of local noise controls. (Cf. *San Diego Unified Port Dist.* v. *Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1316-1319, cert. den. (1982) 455 U.S. 1000 [71 L.Ed.2d 866, 102 S.Ct. 1631] [state may not direct an airport proprietor to exercise its noise abatement power].)

Thus, plaintiffs may not elect to treat the alleged nuisance as continuing: defendant is privileged to continue the nuisance and it must therefore be classified as permanent. (See *Krueger* v. *Mitchell, supra*, 112 Wis.2d at pp. 102-103 [injunctive relief against airport noise unavailable; plaintiff may claim damages for permanent nuisance only].)[2]

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[2]*Nestle* v. *City of Santa Monica* (1972) 6 Cal.3d 920 [101 Cal.Rptr. 568, 496 P.2d 480], does not support a contrary conclusion. In *Nestle* we held, inter alia, that a nuisance action based on airport noise was improperly dismissed on the basis of government immunity, and suggested that the plaintiffs on remand might be able to demonstrate

Claims against public entities alleging injuries to persons or personal property must be brought by the 100th day after the accrual of the cause of action; all other claims — including those for real property damage — must be brought within 1 year after accrual of the cause of action. (Gov. Code, § 911.2.) As plaintiffs implicitly admit, their nuisance cause of action accrued when the public entity undertook operations on January 29, 1978; from that date, plaintiffs claim, defendant's operations have "substantially interfered" with the use and enjoyment of their properties. Because the limitations period began to run at that time, it is clear that plaintiffs' 1982 complaint is untimely.

I would accordingly affirm the order dismissing the nuisance cause of action.

Lucas, J., concurred.

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a continuing nuisance. This dictum, of course, preceded the United States Supreme Court's noise control preemption decision in *City of Burbank* (1973) *supra*, 411 U.S. 624; moreover, the court was not asked to consider *Spaulding's* first requirement for election: a nuisance may not be treated as continuing if the defendant is privileged to continue it.

APPENDIX B

Opinion Of California Court Of Appeal Below

(unofficial report)

AMERIAN, Associate Justice.

BACKGROUND

This is an appeal from a judgment of dismissal entered on April 5, 1983, following the sustaining of a demurrer by respondent Burbank-Glendale-Pasadena Airport Authority (hereinafter respondent) to appellants' first amended complaint for inverse condemnation and nuisance.

Appellants are homeowners who reside adjacent to the Burbank-Glendale-Pasadena Airport (hereinafter Airport). On June 10, 1982, appellants filed a suit for inverse condemnation and nuisance based on damage to persons and property caused by excessive noise, smoke and vibrations from flight patterns to and from the Airport and over appellants' homes. Respondent and the cities of Glendale, Burbank and Pasadena were named as defendants.

The first cause of action of the complaint is for inverse condemnation "for the taking of an easement" over appellants' properties. The cause of action alleges that respondent, "on January 29, 1978, authorized jet take-offs and landings from [Airport]. The activities . . . subject [appellants'] properties to noise, smoke and vibration, which constituted a taking on or about January 29, 1978." it is further alleged that "said flights over [appellants'] . . . properties have continued to the date of [the] complaint" and that the flights "take place at all hours of the day and

night." The cause of action alleges that the "flights cause substantial interference with the use and peaceful enjoyment" of appellants' properties and that the "flights, which constitute a taking, commenced on January 29, 1978."

It is alleged that the "easement for noise, smoke and vibration over [appellants'] properties was taken for a public use." The cause of action alleges that appellants are "claiming compensation for . . . damages and taking of an easement, physical injuries to the real properties, and severance damages in the amounts of their claim . . ."

It is further alleged that the easement taken by respondent is "an air easement . . . taken in the airspace above the surface of the properties. The air easement is for 'excessive noise, vibration discomfort, or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airspace and . . . reduction in the market value of real property by reason thereof . . . through the operation of aircraft to and from the airport,' as those terms are used in California Code of Civil Procedure § 1239.3.[1]"

The second cause of action is for nuisance. The allegations of that cause of action are, in essence, that as a result of the flight patterns authorized by respondent, appellants "suffered interference to the senses, hearing and health [from the] noise and vibrations from [airport]." It is alleged that each appellant "suffered personal injury, in the amount of $100,000.00" and that the

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[1]Code of Civil Procedure section 1239.3 was repealed by Statutes 1975, chapter 1275, section 1, page 3409, operative July 1, 1976. The comment by the Law Revision Commission states, "The substance of Section 1239.3 is continued in Public Utilities Code section 21652."

"personal injury is for the period from one hundred days prior to the filing of the claim to the date of the trial."[2]

On September 24, 1982, a demurrer filed by defendant cities was sustained without leave to amend. A judgment of dismissal was entered as to those defendants on October 5, 1982, and they are not parties to this appeal.

The basis of defendant cities' demurrer to the complaint was that, as a matter of law, only respondent would be liable for any damages. Pursuant to Government Code section 6500 et seq.,[3] defendant cities executed a "joint exercise of powers agreement" whereby respondent was created for purposes of acquiring and operating the then named Hollywood-Burbank Airport. (Presently the Airport is named the Burbank-Glendale-Pasadena Airport). Pursuant to this agreement, dated June 14, 1977, respondent was to become the owner and operator of the Airport and, as authorized by section 6508.1, respondent was "created [as] a public entity, separate and apart from the Parties hereto . . . The debts, liabilities and obligations of the Authority [respondent] do not constitute debts, liabilities or obligations of the Parties."

On October 19, 1982, the complaint was amended by adding the names of Michael A. Rotella and John and

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[2]Copies of the claim submitted to respondent and defendant cities of Glendale, Burbank and Pasadena (hereinafter defendant cities) for personal injuries and property damage caused by flight patterns authorized by respondent over appellants' homes were attached as exhibits to the complaint. The claim for appellants, excluding Mr. Rotella and Mr. and Mrs. Rocke, shows that it was received by defendant cities and respondent on February 23, 1982. The joint claim of Rotella and the Rockes is marked as received on June 16, 1982.

[3]All references are to the Government Code, unless otherwise indicated.

Allison Rocke as plaintiffs to the complaint. A copy of the claim for damages which had been submitted to respondent and defendant cities by Mr. Rotella and Mr. and Mrs. Rocke was also added as an exhibit to the complaint. A demurrer to the amended complaint was filed by respondent on November 18, 1982.

On April 5, 1983, the trial court issued an order sustaining the demurrer of respondent to the first amended complaint without leave to amend. The order and judgment of dismissal which followed were based upon the following rulings:

"(1) The First Cause of Action (inverse condemnation) of the First Amended Complaint fails to state facts sufficient to constitute a cause of action;

"(2) The Second Cause of Action of the First Amended Complaint seeks damages for the maintenance of a nuisance. The proper legal test for determining whether the airport is a permanent nuisance is whether the nuisance is subject to judicial, as opposed to voluntary, abatement. As an airport serving the public, the [Airport] is not subject to judicial abatement. Therefore, if the airport is a nuisance, it is a permanent nuisance and plaintiffs' First Amended Complaint fails to state facts sufficient to constitute a cause of action and is barred by the provisions of California Government Code Section 911.2 and by the California Code of Civil Procedure Sections 338(2) and 340.

"The Court further finds that there is no reasonable possibility that plaintiffs can amend their First Amended Complaint to state any cause of action entitling plaintiffs to any relief against the defendant and that defendant's demurrer to plaintiff's First Amended Complaint should therefore be sustained without leave to amend. . . ."

ISSUES

The following issues are raised in the instant appeal: (1) Whether the trial court erred in sustaining the demurrer to the first cause of action for inverse condemnation on grounds that a cause of action for inverse condemnation could not be stated because respondent is not authorized to exercise the power of eminent domain to acquire air easements over appellants' properties; (2) Whether the trial court erred in sustaining the demurrer to the second cause of action for nuisance on grounds that if the Airport is a nuisance it must be deemed a permanent nuisance and the cause of action for nuisance was, therefore, barred by the applicable statute of limitations as untimely.

For reasons discussed below, we conclude that the trial court properly sustained the demurrer to the first cause of action for inverse condemnation because respondent is not statutorily authorized to exercise the power of eminent domain. We do, however, conclude that the demurrer to the second cause of action was improperly sustained because appellants may, and have elected to, treat the alleged nuisance as continuous and this cause of action, therefore, is not untimely.

DISCUSSION

Inverse Condemnation

[1] On this appeal we must first resolve the issue whether an action for inverse condemnation may be maintained against a public entity only where that public entity has the capacity to exercise the power of eminent domain. Respondent's demurrer to the cause of action for inverse condemnation was based solely on grounds that a cause of action for inverse condemnation cannot be stated

against it because it is not authorized by statute to condemn avigation easements. Respondent forwards the same argument here. In support of this argument respondent relies upon various provisions of the Code of Civil Procedure, the Government Code and the Public Utilities Code. On the basis of the code provisions cited by respondent it is argued that since respondent cannot acquire the subject air easements through the power of eminent domain and since existence of the power to exercise eminent domain is necessary to maintain an action for inverse condemnation, the trial court properly sustained its demurrer to appellants' cause of action for inverse condemnation.

We conclude that respondent properly contends that an action for inverse condemnation may be maintained against it only if it could have taken the air easements at issue through the exercise of the power of eminent domain. We are also persuaded by respondent's argument that it does not have the power to exercise eminent domain because it is not authorized by law to take the air easements at issue here.[4]

The most recent decision by this state's Supreme Court concerning eminent domain is found in *City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 183 Cal.Rptr. 673,

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[4]It is worthy of note that this is not a case where the power to take the air easements under eminent domain is under direct review. Respondent has not initiated formal eminent domain proceedings with respect to the air easements at issue. The issue whether respondent has the power of eminent domain has arisen only because respondent has asserted that it does not have such power as an absolute defense to the action in inverse condemnation. It is in this context that we are called upon to consider the legal concepts of eminent domain and inverse condemnation as well as their interrelationship.

646 P.2d 835. In that case, the court reiterated the established rule that " 'The power of eminent domain is an inherent attribute of sovereignty.' (*County of San Mateo v. Coburn* (1900) 130 Cal. 631, 634 [63 P. 78]; accord *City of Anaheim v. Michel* (1968) 259 Cal.App.2d 835, 837 [66 Cal.Rptr. 543]; *Anaheim Union High Sch. Dist. v. Vieira* (1966) 241 Cal.App.2d 169, 171 [51 Cal.Rptr. 94].) This sovereign power has been described as 'universally' recognized and 'necessary to the very existence of government.' (1 Nichols on Eminent Domain (3d ed. 1980) §§ 1.11, 1.14[2], pp. 1-10, 1-22.) When properly exercised, that power affords an orderly compromise between the public good and the protection and indemnification of private citizens whose property is taken to advance that good. That protection is constitutionally ordained by the Fifth Amendment to the United States Constitution, which is made applicable to the states by nature of the Fourteenth Amendment (*Chicago, Burlington Sc. R'd. v. Chicago* (1897) 166 U.S. 226, 233-241 [17 S.Ct. 581, 583-586, 41 L.Ed.2d 979]) and by article I, section 19 of the California Constitution. [¶] Because the power to condemn is an inherent attribute of general government, we have observed that 'constitutional provisions merely place limitations upon its exercise.' (*People v. Chevalier* (1959) 52 Cal.2d 299, 304 [340 P.2d 598].) The two constitutional restraints are that the taking be for a 'public use' and that 'just compensation' be paid therefor. (*Ibid.; City of Anaheim, supra,* 259 Cal.App.2d at p. 837 [66 Cal.Rptr. 543].) . . ." (*City of Oakland v. Oakland Raiders, supra,* at p. 64, 183 Cal.Rptr. 673, 646 P.2d 835.)

In addition to eminent domain proceedings, the other procedural device for ensuring the constitutional proscription that "private property will not be taken or damaged for public use without just compensation" is

inverse condemnation. The principal distinction between the two procedures is that in eminent domain proceedings, the public authority takes the initiative, whereas in inverse condemnation proceedings it is the property owner who initiates litigation. (See *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119, 109 Cal.Rptr. 799, 514 P.2d 111; *Cothran v. San Jose Water Works* (1962) 58 Cal.2d 608, 25 Cal.Rptr. 569, 375 P.2d 449; *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 28 Cal.Rptr. 357.)

We have discovered no California cases which specifically deal with the question whether actions in inverse condemnation may be maintained only against public authorities who could have first, but did not, initiate formal eminent domain proceedings. However, cases and commentators do suggest that it is only upon this principle that actions or proceedings in inverse condemnation may be brought.

In *United States v. Clarke* (1980) 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373, the Supreme Court determined that Title 25 of the United States Code, section 357, which provides that "lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory" (at p. 254, 100 S.Ct. at 1128) did not authorize a state or local government to "condemn" allotted Indian trust lands by physical occupation. The court, therefore, concluded that an action in inverse condemnation could not be maintained. The court observed that the public entities there involved had never instituted formal action to condemn the land in question. The court expressly rejected the Ninth Circuit Court of Appeals holding that section 357 of Title 25 of the United States Code permitted acquisition of allotted lands by

inverse condemnation after also rejecting the Court of Appeals reasoning that " 'once the taking has been accomplished . . . it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the groun[d] that the state should have filed an eminent domain action prior to the taking.' " (At p. 255, 100 S.Ct. at 1129.)

The Supreme Court discussed, at length, the nature of eminent domain and inverse condemnation proceedings. The court wrote, "[t]he phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, '[i]nverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." ' D. Hagman, Urban Planning and Land Development Control Law 328 (1971) (emphasis [omitted]). A landowner is entitled to bring such an action as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .' See 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase 'inverse condemnation,' as a common understanding of that phrase would suggest, simply describes an action that is the 'inverse' or 'reverse' of a condemnation proceeding. [¶] There also are important practical differences between condemnation proceedings and actions by landowners to recover compensation for 'inverse condemnation.' Condemnation proceedings, depending on the applicable

statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation. . . ." (At p. 257, 100 S.Ct. at 1130.)

The court concluded by holding that the language of section 357, authorizing condemnation of lands, referred "not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority." (*United States v. Clarke, supra,* 445 U.S. at p. 258, 100 S.Ct. at 1131.)

This case does suggest that an action in inverse condemnation against a public authority may be instituted only if the public authority was authorized to condemn the property or property interest in question in the first place through exercising the power of eminent domain. (See also, *Agins v. Tiburon* (1980) 447 U.S. 255, 258, fn. 2, 100 S.Ct. 2138, 2140, fn. 2, 65 L.Ed.2d 106).

In *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 39 Cal.Rptr. 903, 394 P.2d 719, an inverse condemnation case, the court was called upon to determine "whether a property owner who loses the use of the next intersecting street which affords him access to the general system of public streets should be compensated." (At p. 661, 39 Cal.Rptr. 903, 394 P.2d 719.) The court held that the property owner's complaint for inverse condemnation withstood general demurrers because it alleged, inter alia, that the closing of the street crossing in question substantially impaired the property owner's right of access to the street. One of the contentions raised by the railroad was that it was not a proper party defendant to the action. This contention was rejected by the court

which wrote, "defendant railroad was an active joint participant in closing the crossing. . . ." (At p. 662, 39 Cal.Rptr. 903, 394 P.2d 719.) The court arrived at this conclusion after taking judicial notice that a public utilities commission decision authorized the City of Los Angeles to close the street crossing in issue. It is apparent that the city, in turn, authorized the defendant railroad to participate in closing the street crossing. Implicit in the court's determination that the railroad was a proper party defendant in the inverse condemnation action was that it was a proper party defendant only by virtue of the authorization for it to participate in closing the street crossing.

Commentators also recognize that existence of the power of eminent domain is a prerequisite to liability in inverse condemnation proceedings instituted by private property owners. One commentator has observed that "an airport approach height restriction would, apparently, require payment of compensation if invoked to limit development of property located adjacent to a *publicly* operated airport, but not if applied to like property on the periphery of a *privately* owned and operated airport." (Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Lawyer 1, 22.) Another commentator expressly observed that, "[t]he remedy of inverse condemnation, by the very premise which gives rise to it, is available only as against defendants who possess the power of eminent domain." (3 P. Nichols, Eminent Domain § 8.1[4] 8-39 [1981].)[5]

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[5]22A West, Words and Phrases (1958), p. 231, provides that, "inverse or reverse condemnation contemplates a situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made."

We conclude, then, that respondent correctly urges that an action in inverse condemnation may only be maintained against a party in whom the power of eminent domain is vested.

[2, 3] We turn now to the question of whether respondent has the power to exercise eminent domain for purposes of acquiring the air easements involved in the case at bar. The general rule with respect to public entities such as respondent is that such public entities have " '. . . no inherent power of eminent domain and can exercise it only when expressly authorized by law. [Citation.]' " (*City of Oakland v. Oakland Raiders, supra,* 32 Cal.3d 60, 64, 183 Cal.Rptr. 673, 646 P.2d 835.) We are thus obliged to examine the statutes pertinent to the case before us.[6]

[4] Both parties to this appeal refer us to section 6546.1 and Public Utilities Code section 21652. Section 6546.1, contained in article 2 entitled, "Power to Issue Revenue Bonds," provides:

"In the County of Los Angeles, any agency, commission, or board provided for by joint powers agreement entered into by cities pursuant to Article 1 (commencing with Section 6500) of this chapter for the purpose of the

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[6]Appellants have extensively argued that statutory authority for exercising the power of eminent domain is not required because of the "self-executing" nature of the California and United States Constitutions. This is an incorrect interpretation of the concept that the proscription against taking private property for public use without just compensation is self-executing. The self-executing nature of article I, section 19 of the California Constitution and the 5th Amendment of the United States Constitution refers only to the remedy, not to the theory of recovery. (See *United States v. Clarke, supra,* 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373; *City of Oakland v. Oakland Raiders, supra,* 32 Cal.3d 60, 64, 183 Cal.Rptr. 673, 646 P.2d 835.)

acquisition, operation, repair, maintenance, improvement and administration of the Hollywood-Burbank Airport as a public airport, pursuant to the Federal Aviation Act of 1958, as amended, may carry out such purpose and may authorize the issuance of revenue bonds, pursuant to this article, to pay for acquiring, repairing, improving, financing and refinancing such project including all facilities and improvements and all expenses incidental thereto or connected therewith. Property tax revenues accruing to, levied by, or collected by any local agency which is a party to such a joint powers agreement shall not be used to redeem such revenue bonds unless an ordinance authorizing the use of such property tax revenues for such purposes is approved by a majority vote of the electors of the local agency voting on the issue. In operating the airport, the separate public entity above mentioned shall not permit or authorize any activity in conjunction with the airport which results in an increase in the size of the noise impact area based on a community noise equivalent level of 70 decibels as established pursuant to Title 21, California Administrative Code, Chapter 2.5, Subchapter 6, and shall further comply with the future community noise equivalent levels prescribed by such title as it now exists or is hereafter amended.

"The separate public entity shall implement the noise monitoring requirements set forth in Title 21, California Administrative Code, Chapter 2.5, Subchapter 6. In addition, the entity shall diligently pursue all reasonable avenues available to insure that the adverse effects of noise are being mitigated to the greatest extent reasonably possible.

"The separate public entity shall not authorize or permit the lengthening of runways defined herein as the paved portions of the runways presently on airport prop-

erty, or the purchase of fee title to condemned real property zoned for residential use as of the effective date of this statute.

"The power to issue revenue bonds under this section shall be of no further force and effect after December 31, 1980, unless (1) the entity shall have initially issued revenue bonds on or prior to December 31, 1980, or (2) the entity is unable to initially issue revenue bonds to accomplish the purpose of this section by reason of litigation, in which case the power to initially issue revenue bonds under this section shall continue to be effective until the final determination of such litigation and for one year thereafter. If the entity shall have initially issued revenue bonds within either of the time periods permitted by the prior sentence of this paragraph, the power to issue revenue bonds under this section shall continue so long as this section shall be in effect."

Public Utilities Code section 21652 provides:

"(a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation, or otherwise:

"(1) Any property necessary to permit the safe and efficient operation of the airport, or to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards, or to prevent the establishment of airport hazards.

"(2) Airspace or an easement in such airspace above the surface of property where necessary to permit imposition upon such property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to the operation of aircraft to and from the airport.

"(3) Remainder property underlying property taken pursuant to paragraph (2), where permitted by Section 1240.410 of the Code of Civil Procedure.

"(b) As used in this section, 'property' includes real and personal property and any right or interest therein, whether within, beyond, adjacent to, or in the vicinity of, the boundaries of an airport or airport site, and, by way of illustration and not by way of limitation, includes air rights, airspace, air easements, and easements in airport hazards."

Appellants urge that while section 6546.1 prohibits respondent from acquiring "fee title to condemned real property," Public Utilities Code section 21652, nevertheless, authorizes respondent to acquire fee title to air easements over their private property by exercising the power of eminent domain. Respondent, on the other hand, argues that the plain language of section 6546.1 prohibits it from acquiring, through condemnation, fee title to air easements as well.

We conclude that neither section 6546.1 nor Public Utilities Code section 21652 authorizes respondent to exercise the power of eminent domain to acquire the air easements at issue here. Our conclusion rests upon consideration of the legislative history and intent surrounding the amendment to section 6546.1, in 1978.

The legislative history of section 6546.1 shows that the third paragraph of this section which prohibits respondent from purchasing "fee title to condemned real property zoned for residential use" was added by amendment in 1978. (Stats. 1978, ch. 62, § 1.) Another provision was added to section 6546.1 by the 1978 amendment. That provision extended respondent's power to issue revenue bonds necessary to continued operation of the Airport.

Section 2 of Statutes 1978, chapter 62 provides:

"This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into effect immediately. The facts constituting such necessity are:

"The present owner-operator of the Hollywood-Burbank Airport currently plans to cease operation of said airport. Because no private person is presently willing and able to acquire and operate said airport, the substantial use thereof by the public will cease unless said airport is acquired and operated by a public entity. Because the principal service area of the airport consists of more than one city in the County of Los Angeles but not the entire county, a joint powers entity established by the cities in said county which are located in said principal service area will best serve the interests of the public using the airport. Because this act will empower such a public entity to acquire, operate, repair, maintain, improve and administer said airport, it is necessary that this act take effect immediately in order to prevent interruption in or termination of public use of the Hollywood-Burbank Airport."

Further enlightenment as to the legislative intent in promulgating the 1978 amendment of section 6546.1 is found in the summary digest for laws enacted in 1978. There, it is stated that:

"Existing law provides that in the County of Los Angeles, any agency, commission or board established pursuant to the exercise of the joint powers agreement entered into by cities for the purpose of maintaining the Hollywood-Burbank Airport as a public airport, is author-

ized to issue revenue bonds. The power to issue such bonds terminates as of December 31, 1980. [¶] This bill would extend the power to issue revenue bonds as long as the provision continues to be in effect if the entity has initially issued such bonds on or prior to December 31, 1980. The requirement of initial issuance of such bonds would be extended in the event issuance of bonds is prevented by litigation. [¶] This bill would take effect immediately as an urgency statute." (1978 Summary Digest, ch. 62, p. 17.)

From this scant legislative history, several conclusions respecting the promulgating intent of the 1978 amendment of section 6546.1 may be drawn. First, and most significant in our view, is that the primary purpose of the amendment was to effectuate uninterrupted public use of the Airport by extending respondent's power to issue revenue bonds under certain conditions. Second, since the history is conspicuously silent as to the intent which motivated addition of the third paragraph of section 6546.1, that paragraph cannot be reasonably construed as evidence of a legislative intent to grant respondent the power of eminent domain. Third, this paragraph notwithstanding, section 6546.1, cannot be construed as granting to respondent the power of eminent domain as this section primarily relates to the means by which respondent can generate funds to operate and maintain the Airport, i.e., through issuance of revenue bonds.

Contrary to what appellants contend, Public Utilities Code section 21652 does not authorize respondent to take by condemnation the air easements in issue here. While that section recognizes that air easements may be acquired by condemnation "where necessary to permit imposition . . . of excessive noise, vibration . . . due to the operation of aircraft to and from the airport"

(Pub.Util.Code § 21652, subd. (a)(2)), the section also specifies that only persons "*authorized* to exercise the power of eminent domain" may acquire such air easements (Pub.Util.Code, § 21652, subd. (a), emphasis added). This section, therefore, cannot be construed as granting to respondent the power of eminent domain to take the subject air easements.

We conclude, therefore, that respondent does not have statutory power to take the air easements in issue here by exercising the power of eminent domain. Consequently, since authority to exercise the power of eminent domain is a prerequisite to maintaining an action in inverse condemnation, the trial court properly sustained respondent's demurrer without leave to amend upon those grounds.

Nuisance

The demurrer to appellants' cause of action for nuisance was sustained without leave to amend on grounds that a permanent nuisance is not subject to "judicial abatement" and that "if the airport is a nuisance, it is a permanent nuisance." Upon these grounds, the court found that the cause of action for nuisance failed to state facts sufficient to constitute a cause of action and was barred by section 911.2 and Code of Civil Procedure sections 338, subdivision (2) and 340, as untimely.

Appellants contend that the demurrer to the nuisance cause of action was improperly sustained because the nuisance complained of can be abated, is continuous in nature, and is not, therefore, barred by the applicable statute of limitations. At argument, counsel for respondent conceded that if appellants overcame the statute of limitations problem, a cause of action for damages had been pled. Accordingly, we restrict our discussion to the

question of whether the nuisance is permanent or continuous.

We hold that the order sustaining the demurrer to the cause of action for nuisance was erroneous, but upon slightly different grounds than urged by appellants. Our discussion begins with the relevant sections of the Civil Code.

Section 3479 of the Civil Code provides: "Anything which is injurious to health, . . . or offensive to the senses, . . . so as to interfere with the comfortable enjoyment of life or property, . . . is a nuisance." The Civil Code also distinguishes nuisances as either public or private. A public nuisance is defined by Civil Code section 3480 as ". . . one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." A private nuisance is defined in Civil Code section 3481 as "[e]very nuisance not included in the definition of the last section. . . ."

[5, 6] The second cause of action for nuisance seeks damages for personal injuries caused by noise and vibrations and purports to be a cause of action for private nuisance. (Cf. *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 122-124, 99 Cal.Rptr. 350.) As observed in the latter case, the significant difference between a private and public nuisance is that the former "is a civil wrong based on disturbance of rights in land" whereas the latter "is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." (*Id.*, at p. 124, 99 Cal.Rptr. 350.) Here, the allegations of the second cause of action for nuisance incorporate most of the allegations of the first cause of action for inverse condemnation, which

include, inter alia, the allegation that jet flights over appellants' real properties "cause a substantial interference with the use and peaceful enjoyment of [appellants'] real properties." Appellants, as owners and residents of the real property over which flights to and from the Airport are made, have thus adequately alleged interference with a property right upon which to predicate a claim for damages for personal injury arising from private nuisance.

[7] With respect to private nuisances, Civil Code section 3501 provides that either a civil action (for damages) or abatement are available remedies. Appellants have not sought abatement of the nuisance but have elected to sue for damages for personal injuries allegedly suffered as a consequence of the activities authorized by respondent.[7]

[8] It is well-established in this state that owners or operators of public airports are liable upon a nuisance theory (public or private) for personal injuries and property damage sustained by persons living in areas adjacent to the airports caused by noise and vibrations from aircraft using the facilities. (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480.) Cognizant of this, the question is thus whether the nuisance complained of in the second cause of action is permanent or continuous for purposes of determining whether the statute of limitations bars the cause of action for nuisance.

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[7]In this state a party injured by maintenance of a nuisance need not seek abatement thereof, but may sue for damages. (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254, 172 P.2d 758.)

[9] There is no apparent dispute by appellants or respondent over the applicable statute of limitations if the nuisance is deemed permanent. Under the joint exercise of powers agreement executed by defendant cities, respondent was created as a separate public entity. As such, the provisions of the Tort Claims Act (§ 800 et seq.) are applicable. Specifically, appellants were required to file a claim with respondent for their personal injuries as a condition precedent to filing a lawsuit for damages against respondent.

Section 911.2 provides: "A claim relating to a cause of action . . . for injury to person . . . shall be presented . . . not later than the 100th day after the accrual of the cause of action. . . ." Section 901 provides, in part: "[T]he date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented to and acted upon by the public entity before an action could be commenced thereon."

The applicable statute of limitations for the alleged personal injuries caused by aircraft noise and vibrations as alleged in appellants' second cause of action is one year. (Code Civ.Proc., § 340.) Here, appellants instituted the instant lawsuit within six months after their claims were submitted to and denied by respondent (see § 911.2), and within one year of the period for which appellants seek damages for their personal injuries.

Respondent, however, persuaded the trial court that the nuisance complained of was required to be characterized as a permanent nuisance because the airport, itself, could not be abated.

[10] Where a nuisance is considered permanent, the limitations period runs from the time the nuisance is created. (*Phillips v. City of Pasadena* (1945) 27 Cal.2d 104, 107, 162 P.2d 625.) "On the other hand, if the nuisance may be discontinued at any time it is considered continuing in character. [Citations.] Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred." (*Id.*, at pp. 107-108, 162 P.2d 625.)

[11] Respondent argues that the sole test for determining whether a nuisance is permanent or continuing depends upon whether the nuisance can be eliminated or abated, or whether it is likely to continue indefinitely. In support of these arguments, respondent relies primarily upon *Spaulding v. Cameron* (1952) 38 Cal.2d 265, 239 P.2d 625, and *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 288 P.2d 507 and Code of Civil Procedure section 731a.[8] Close scrutiny of these cases, however, shows that even where a nuisance may not or need not be

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[8]Code of Civil Procedure section 731a provides: "Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilizing plants, refineries and other similar establishments whose operation produce offensive odors."

abated (Code Civ.Proc., § 731a), appellants may, nevertheless, elect to treat that nuisance as continuing.

Spaulding v. Cameron, supra, 38 Cal.2d 265, 239 P.2d 625, involved an action for damages and for injunctive relief brought by a homeowner whose property was subjected to damages from mud caused by the defendant's negligence in constructing a fill during leveling operations conducted by the defendant on his property located near plaintiff's land. Plaintiff was awarded past and future damages as well as injunctive relief in the form of an order that defendant remove the fill or take protective measures to prevent further damage to plaintiff's property. The Supreme Court reversed, in part, the trial court's judgment because the award of future damages and the injunction to abate the nuisance were mutually exclusive remedies and plaintiff was not entitled, therefore, to double recovery. The Supreme Court observed that since there was evidence to support both remedies (anticipated damages and the injunction), it could not be said as a matter of law that the nuisance could or could not be abated. The cause was remanded to the trial court for a determination whether or not the nuisance was permanent. The judgment for past and present damages was affirmed.

Kornoff v. Kingsburg Cotton Oil Co., supra, 45 Cal.2d 265, 288 P.2d 507, involved an action by homeowners living adjacent to a cotton gin for damages (past, present and future) for nuisance caused by the noxious odors, fumes, dust and lint created by the cotton gin during its operations. The evidence showed that the cotton gin was operational for only six months out of each year. The court observed at the outset of its opinion that "the parties apparently treated the trespass as permanent because of its recurrent character, rather than as a con-

tinuous trespass." (*Id.*, at p. 268, 288 P.2d 507.) The issue whether plaintiffs could recover future damages was discussed in light of *Spaulding v. Cameron, supra,* 38 Cal.2d 265, 239 P.2d 625, and revolved around the question of whether the nuisance created by the cotton gin should be characterized as continuing or permanent. The court quoted from *Spaulding* as follows:

" 'The remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred. Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or the defendant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were allowed in one action. [Citations.]

" 'The clearest case of a permanent nuisance or trespass is one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once. [Citations.]

" 'A more difficult problem is presented, however, if the defendant is not privileged to continue the nuisance or trespass but its abatement is impractical or the plaintiff is willing that it continue if he can secure full compensation for both past and anticipated future injuries. To attempt categorically to classify such a nuisance as either permanent or not may lead to serious injustice to one or the

other of the parties. Thus, if the plaintiff assumes it is not permanent and sues only for past damages, he may be met with the plea of res judicata in a later action for additional injury if the court then decides the nuisance was permanent in character from its inception. [Citation.] Similarly, if the initial injury is slight and plaintiff delays suit until he has suffered substantial damage and the court then determines that the nuisance was permanent, the defendant may be able to raise the defense that the statute of limitations ran from the time of the initial injury. [Citation.] On the other hand, if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that it will continue. [Citations.]

" 'Because of these difficulties it has been recognized that in doubtful cases the plaintiff should have an election to treat the nuisance as either permanent or not. [Citations.] If the defendant is not privileged to continue the nuisance and is able to abate it, he cannot complain if the plaintiff elects to bring successive actions as damages accrue until abatement takes place. [Citations.] On the other hand, if it appears improbable as a practical matter that the nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions. [Citations.]' " (*Kornoff v. Kingsburg Cotton Oil Co., supra,* 45 Cal.2d at pp. 269-271, 288 P.2d 507.)

The court then made the following observation: "In the present case, defendant's ginning mill is lawfully operated in a location properly zoned therefor and need not, or may not (Code Civ.Proc., § 731a), be abated. If plaintiffs are not permitted to sue for all damages, past, present, and future, then they must bring successive actions each year at the close of each ginning season with the attendant risk that the court may determine that the

trespass occurring the previous year was a permanent one for which plaintiffs had been theretofore adequately compensated. [¶] It appears that here plaintiffs elected to sue for all damages past, present and future and that such damages are recoverable under the rule heretofore set forth (*Spaulding v. Cameron, supra,* 38 Cal.3d 265 [239 P.2d 625])." (*Kornoff v. Kingsburg Cotton Oil Co., supra,* 45 Cal.2d at p. 271, 288 P.2d 507.)

Implicit in this observation is cognizance of the plaintiffs' *election* to characterize the nuisance as permanent. Nothing in *Spaulding* or *Kornoff* suggests that where an operation of an enterprise need not or may not be abated (Code Civ.Proc., § 731a), a plaintiff seeking recovery for damages upon a theory of nuisance *must* elect to treat the nuisance as permanent. It is also observed that Code of Civil Procedure section 731a does not preclude the rights of landowners, such as appellants, who suffer from airplane annoyances to seek damages from the owners or operators of an airport. (See *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548; *Greater Westchester Homeowners Assn. v. City of Los Angeles, supra,* 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329.) There are no California cases which hold that even where injunctive relief is unavailable under Code of Civil Procedure section 731a, the nuisance for which damages or compensation is sought must be characterized as permanent.

Indeed, the language of *Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480, supports the conclusion that nuisances caused by the owners or operators of airports are not necessarily permanent but may be characterized as continuous nuisances for purposes of resolving disputes concerning the statute of limitations. In *Nestle,* homeowners brought suit against

the City of Santa Monica for injuries alleged to have been suffered by virtue of the city's operation of the Santa Monica Airport. The homeowners sought to recover property and personal injury damages claiming that "vibration, fumes, and noise emanating from jet aircraft landing and taking off at the airport caused damage to their property, interfered with the free enjoyment of their property and resulted in physical pain, suffering and emotional disturbance." (*Id.*, at p. 924, 101 Cal.Rptr. 568, 496 P.2d 480.) The homeowners asserted theories of inverse condemnation, nuisance, negligence and zoning violations as the bases of recovery. The trial court ruled, inter alia, that the homeowners had failed to state facts sufficient to state a cause of action for nuisance upon the theory that the city was immune from liability for damages.

The Supreme Court reversed that ruling, holding that the City of Santa Monica was not immune from liability. The court then observed: "On remand, concern over application of the proper statute of limitations may arise. If appellants demonstrate that whatever nuisance caused by the defendant is continuing in nature, every repetition of the wrong may create further liability. Hence, the statute of limitations would not run merely from the original intrusion. This is the well-settled rule with respect to property damage (see, e.g., *Phillips v. City of Pasadena* (1945) 27 Cal.2d 104, 107-108 [162 P.2d 625]), and it would be incongruous for each repetition to be considered a separate wrong for property damage purposes but not for personal injuries. . . . Accordingly, if the statute of limitations becomes an issue, the trial court must determine whether nuisance causing personal injury loss has concluded or is continuing and then apply the appropriate statute of limitations principles." (*Nestle v. City of Santa*

Monica, supra, 6 Cal.3d at pp. 937-938, 101 Cal.Rptr. 568, 496 P.2d 480; fn. omitted.)

Furthermore, the Supreme Court in *Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480, also rejected the trial court's conclusion that "the airport was not a nuisance because it was maintained under the authority of several statutes. Section 3482 of the Civil Code provides: 'Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.' " (*Id.,* at p. 938, fn. 16, 101 Cal.Rptr. 568, 496 P.2d 480.) The court then wrote: "In *Hassell v. San Francisco* (1938) 11 Cal.2d 168 [78 P.2d 1021], appellant contended that, by virtue of section 3482, the construction of a public convenience station above ground could not constitute a nuisance. In rejecting that argument, we interpreted the section narrowly, stating (at p. 171 [78 P.2d 1021]): ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury." ' " (*Id.,* at p. 938, fn. 16, 101 Cal.Rptr. 568, 496 P.2d 480.) Therefore, "although an activity authorized by statute cannot be a nuisance, the manner in which the activity is performed may constitute a nuisance." (*Venuto v. Corning-Owens Fiberglas Corp., supra,* 22 Cal.App.3d at p. 129, 99 Cal.Rptr. 350.)

[12] These rules persuade us that respondent's argument that the Airport must be characterized as a permanent nuisance because it cannot be abated is not sound. While it is clear that the Airport may not be abated and

may not be considered a nuisance absent specific allegations concerning "unnecessary and injurious" methods of operations (Code Civ.Proc., § 731a), it is also clear that the *manner* in which the authorized activity is conducted may constitute a nuisance. It is this type of nuisance which serves as the basis of appellants' cause of action for nuisance. Through incorporation by reference many of the allegations of the first cause of action for inverse condemnation, appellants have alleged in the cause of action for nuisance that the activities (flights) causing the nuisance "have continued to the date of [the] complaint." This allegation, in conjunction with the allegation that the personal injuries suffered as a "result of interference, noise, and vibrations . . . is for the period from 100 days prior to the filing of the claim to the date of the trial," shows that: (1) the noise and vibrations caused by the flight patterns authorized over appellants' homes may constitute a private nuisance, and (2) that appellants have elected to characterize the nuisance as continuous.

We conclude that appellants did state facts sufficient to state a cause of action for nuisance and that the cause of action for nuisance is not barred by the statute of limitations.[9]

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[9]In this case the question of whether the noise levels, scheduling of flights and location of flight patterns can be altered while at the same time respondent can still operate the Airport is a fact question which has not been reached yet, inasmuch as we are dealing with pleading issues raised on demurrer.

DISPOSITION

The judgment of dismissal is reversed. The matter is remanded to the trial court with instructions to enter a new order sustaining the demurrer to the first cause of action and overruling the demurrer to the second cause of action, allowing respondent time to answer.

KINGSLEY, Acting P.J., and LUCAS, J.*, concur.

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*Assigned by the Chairperson of the Judicial Council.

APPENDIX C

Order Of Los Angeles County Superior Court Below

Superior Court Of The State Of California For The County Of Los Angeles.

Mr. and Mrs. Kenneth L. Baker, et al., Plaintiffs, vs. Burbank-Glendale-Pasadena Airport Authority, Defendant. Case No. C 413 871.

Order Sustaining Demurrer Without Leave To Amend And Judgment Of Dismissal.

The demurrer of defendant Burbank-Glendale-Pasadena Airport Authority to the First Amended Complaint having been submitted on March 8, 1983, and the Court having heard the argument of counsel and considered all the moving papers in connection therewith, the Court rules as follows:

(1) The First Cause of Action (inverse condemnation) of the First Amended Complaint fails to state facts sufficient to constitute a cause of action;

(2) The Second Cause of Action of the First Amended Complaint seeks damages for the maintenance of a nuisance. The proper legal test for determining whether the airport is a permanent nuisance is whether the nuisance is subject to judicial, as opposed to voluntary, abatement. As an airport serving the public, the Burbank-Glendale-Pasadena Airport is not subject to judicial abatement. Therefore, if the airport is a nuisance, it is a permanent nuisance and plaintiffs' First Amended Complaint fails to state facts sufficient to constitute a cause of action and is barred by the provisions of California *Govern-*

ment Code Section 911.2 and by California *Code of Civil Procedure* Sections 338(2) and 340.

The Court further finds that there is no reasonable possibility that plaintiffs can amend their First Amended Complaint to state any cause of action entitling plaintiffs to any relief against the defendant and that defendant's demurrer to plaintiff's First Amended Complaint should therefore be sustained without leave to amend. Defendants are entitled to recover their costs in the amount of $_____ pursuant to California *Code of Civil Procedure* Section 1032 *et seq.*

This Order constitutes a judgment of dismissal with prejudice and is effective for all purposes and the Clerk is ordered to enter said judgment in accordance with California *Code of Civil Procedure* Section 581(d).

ORDER

IT IS SO ORDERED.

DATED: April 5, 1983.

MAX F. DEUTZ
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 23, 1985, I served the within Petition for Writ of Certiorari in re: "Burbank Glendale v. Kenneth L. Baker" in the United States Supreme Court, October Term 1985, No. . . . .

on the Attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John J. Schimmenti
Schimmenti, Mullins & Berberian
999 No. Supelveda Blvd., #602
El Segundo, CA 90245

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 23, 1985, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1101

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY,

Petitioner,

vs.

KENNETH L. BAKER, et al.,

Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

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KENNETH L. BAKER, et al.

57pp

QUESTIONS PRESENTED FOR REVIEW

1. Is continuing nuisance liability for airports consistent with the supremacy clause as applied by this Court in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)?

2. Does interstate commerce remain protected under the law of continuing nuisance?

PARTIES BELOW

The parties to the proceedings in the California Supreme Court from which review is sought are Petitioner Burbank-Glendale-Pasadena Airport Authority* and Respondents Mr. and Mrs. Kenneth L. Baker, Patrick J. Bigley, William & Jan Billos, Joe & Angie DeCasper, Charles & Janet Ludecke, Mr. and Mrs. Frank B. Miller, Sr., Thomas D. & Irene

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*Petitioner Burbank-Glendale-Pasadena Airport Authority is a joint powers agency created by the cities of Burbank, Glendale and Pasadena pursuant to California Government Code §§ 6500 et seq. and 6546.1.

Pineiro, Gary & Gail Rainwater, John & Allison Rocks, Herb & Rose Rosen, Michael A. Rotella, Michael & Irma Taranto and Carl & Doris Waugh.

TABLE OF CONTENTS

Questions Presented for Review

Opinions Below 1

Jurisdiction 1

Statement of the Case 2

Argument 7

I

Continuing Nuisance Liability for Airports Is Consistent With the Supremacy Clause As Applied by This Court in City of Burbank v. Lockheed Air Terminal, Inc. 7

A. The Preemption of Nuisance Liability For Airports Was Not At Issue in the Courts Below 7

B. Federal Law Preserves a State's Ability to Compensate Victim's of Airport Nuisances 9

C. Supreme Court Precedent and Federal Case Law Supports Continuing Nui-

sance Liability for Airports 13

II

Interstate Commerce Remains Protected under the California Law of Continuing Nuisance 18

A. The Affect of Nuisance Liability on Interstate Commerce Was Never At Issue In the State Courts 18

B. Evenhanded, Legitimate, Local Action Is Constitutional, Unless Its Burden on Interstate Commerce Is Clearly Excessive 19

C. Continuing Nuisance Liability for Airports Imposes No Undue Burden On Interstate Commerce 20

Conclusion 29

Appendix: Petitioner's Second Supplemental Memorandum in Support of Demurrer to Amended Complaint A-1

TABLE OF AUTHORITIES CITED

Cases

City of Burbank v. Lockheed Air Terminal, Inc., 441 U.S. 624 (1973) 2,11,14

Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 249 (1851) 20

Greater Westchester Homeowners Assn. V. Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal.Rptr 733 (1979) cert. denied, 449 U.S. 820 (1980) 15,16,25

Griggs v. County of Allegheny, 369 U.S. 857 (1962) 13,16

H.P.Hood & Sons v. DuMond, 336 U.S. 525 (1949) 25

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 20,22

Luedtke v. County of Milwaukee, 521 F. 2d 387 (7th Cir. 1975) 15,17

Phillips v. City of Pasadena, 27 Cal. 2d 104, 162 P.2d 625 (1945) 3

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 20,21,25,27

Pirolo v. City of Clearwater, 711 F.2d 1006, 1009 (11 Cir. 1983) 17

Rankin v. DeBare, 205 Cal. 639, 271 P.1050 (1928) 3

South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) 23

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 20

Stiles v. Laird, 5 C. 120, 63 Am. Dec. 110 (1855) 10

Willson v. Black Bird Creek Marsh Co., 2 Pet. 245 (1829) 19

Statutes

Airline Deregulation Act of 1978, Pub. L. 95-504, § 105, 92 Stat.

1708, 49 U.S.C. § 1305 (West Supp. 1985) 11

California Code of Civil Procedure, Sec. 731 (West 1980) 10

California Code of Civil Procedure, Sec. 731(a) (West 1980) 13,24

California Government Code, Sec. 911.2 (West 1980) 3

California Government Code, Sec. 6546.1 (West 1980) 22

United States Code, Title 28, Sec. 1257(3) 1

Other

Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393 (1960) 9,18

Congressional Record, Vol. 124, p. 37, 419 (1978) 12

No. 85-1101

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1985

Burbank-Glendale-Pasadena

Airport Authority,

Petitioner,

vs.

Kenneth L. Baker, et al.,

Respondents.

Respondents, Mr. and Mrs. Kenneth L. Baker, et al., respectfully request that the Petition for Writ of Certiorari be denied and that this Court let stand the decision of the Supreme Court of the State of California in Baker, et al., v. Burbank-Glendale-Pasadena Airport Authority.

OPINIONS BELOW

Under California law a nuisance may be treated as either "permanent" or "continuing". In reviewing the decisions below, the California Supreme Court held that a permanent nuisance is an "encroachment of a permanent nature erected upon one's lands", while a continuing nuisance is "a complaint made, not of the location of the offending structures, but of the continuing use of such structures". 39 Cal. 3d at 870. Furthermore, since the noise, fumes, and vibrations emanating from an airport are continuing in nature and subject to a proprietor's control, a plaintiff may elect to treat an airport as a continuing nuisance and sue for damages as they accrue.[1]

JURISDICTION

This case is not properly subject to the jurisdiction of this Court. Under 28 U.S.C. § 1257(3),

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[1]The California Supreme Court also held that a public entity lacking the power of eminent domain may be sued for inverse condemnation. The entire opinion, along with the lower court decisions, is set out as an appendix to petitioner's brief.

review by certiorari is only appropriate when substantial federal questions have been raised at the state level. Contrary to petitioner's contention, no federal statutes were ever at issue and no question of possible effects upon interstate commerce was ever raised. Even the scope of this Court's decision in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), was only incidental to the California Supreme Court's decision.

STATEMENT OF THE CASE

Petitioner, the Burbank-Glendale-Pasadena Airport Authority, became a public entity in 1978. Respondents are homeowners who live in neighborhoods adjacent to the airport and who are subject to the unsettling effects of its aircraft. Petitioner airport began authorizing flights over respondents' homes in January of 1978. The flights have resulted in excessive noise, fumes, and vibration that are detrimental to respondents' hearing

and health and interfere with the peaceful enjoyment of their residences.

In 1982, the homeowners filed suit in the California Superior Court to recover for property damage and personal injury. They sought compensation under theories of both inverse condemnation and continuing nuisance. A continuing nuisance claim is not subject to the statute of limitations and demands payment only of damages suffered before the action was brought. Phillips v. City of Pasadena, 27 Cal. 2d 104, 107, 162 P.2d 625 (1945). On the contrary, a permanent nuisance claim must be filed within 100 days after the accrual of the cause of action and demands payment of all damages, past and future. See Cal. Gov't Code § 911.2; Rankin v. DeBare, 205 Cal. 639, 541,

271 P. 1050 (1928).[2] The homeowners sought to treat the nuisance as continuing and thereby skirt the issue of the statute of limitations.

In April of 1983, the Superior Court sustained a demurrer after finding that the nuisance was permanent and that the statute of limitations had run. It held that, under California Law, a permanent nuisance is one which is immune from judicial abatement. It then reasoned that, since an airport may not be enjoined by court order, it is a permanent nuisance. Thus respondents' claims were barred by the applicable statute of limitations.

The homeowners appealed their case to the

---

[2]Continuing nuisance is really more favorable to an airport since it assumes that the harm might abate in the future; whereas permanent nuisance compensates for all future damage speculatively. Ironically petitioners sought to be labeled a permanent nuisance so that the statute of limitations would bar respondents' claims.

California Court of Appeals. The Court of Appeals reversed the lower court's ruling and held that, under California law, a plaintiff may elect to treat a nuisance as continuing if it may be voluntarily abated. As a result, respondents could plead continuing nuisance and do so without fear of a statutory bar.

The California Supreme Court then affirmed the decision of the Court of Appeals but substituted its own version of the "permanent-continuing" distinction. The court stated that "permanent nuisances are of a type where, by one act, a permanent injury is done, and damages are assessed once for all". 39 Cal. 3d at 868. However, "if a nuisance is a use which may be discontinued at any time, it is considered continuing in nature". Id. at 869. Since airport operations could be altered so as to discontinue any harmful by-products, the airport could be classified as

continuing in nature.

The decisive issue in this case at all levels has been whether respondents could characterize the nuisance as permanent or continuing under California law. Never has it been questioned whether respondents' right to plead nuisance is unconstitutional. Nevertheless, petitioner, in an attempt to create a reviewable federal issue, has now belatedly questioned the propriety of nuisance actions against airports. Such an attempt clearly violates the well-established Supreme Court rule that issues brought for review must have been raised in the state courts. See Brennan, State Court Decisions and the Supreme Court, 31 Penn. Barr Assn. Q. 393, 399-400 (1960).

ARGUMENT

I

CONTINUING NUISANCE LIABILITY FOR AIRPORTS IS CONSISTENT WITH THE SUPREMACY CLAUSE AS APPLIED BY THIS COURT IN CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.

A. The Preemption of Nuisance Liability for Airport was not At Issue in the Courts Below.

Despite the limited holding in this case, petitioner now seeks to obtain review in this Court by creating a question of federal preemption. In fact, petitioner has never before argued that state nuisance actions are preempted by federal law. What it did argue is that, because of the federal preemption of the control of airports, its

operations should be classified as a permanent nuisance. Any argument about total preemption was unnecessary since petitioner hoped to characterize its nuisance as permanent and thus barred by the statute of limitations. Because that attempt failed, petitioner now requests review on the grounds that nuisance liability violates the supremacy clause of the Constitution.

The California Supreme Court's holding hardly raises a question of the preemption of state nuisance actions for airport noise. The posture of the case on demurrer lent itself only to the question of the characterization of the nuisance. Any discussion by the California court of the preemption of such actions must be viewed as dictum since petitioner had already conceded the constituion-

ality of nuisance actions at the trial level.[3] Were this Court now to preempt such actions, petitioner would return victor in a legal battle never entertained at the state level. Petitioner should not now be allowed to raise this novel argument in a last-ditch effort to absolve itself of responsibility for harm done to neighboring residences. See Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 343, 399-400 (1960).

B. Federal Law Preserves a State's Ability to Compensate Victims of Airport Nuisances

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[3] In demurring on statute of limitations grounds petitioner stated that plaintiffs "had a statutory nuisance remedy which they lost because they failed to act reasonably promptly after determining that airport operations unreasonably interferred with the use and enjoyment of their property". See Appendix. A-11.

State nuisance actions have long been recognized at common law and by statute. See Stiles v. Laird, 5 c. 120, 63 Am. Dec. 110 (1855). More specifically, in California, a nuisance cause of action became codified as early as 1851. Cal. Civ. Proc. Code § 731 (West 1980). The purpose of nuisance law is to protect the health and senses of a state's citizens and preserve the peaceful enjoyment of their land. Id. Of course, with the advent of airflight and urbanization, the goal of nuisance law becomes more difficult to achieve. The competing interests of modern air flight and urban living meet head on as airports and cities become more concentrated. Despite these developments, Congress has never intimated that the national system of air transportation is immune from private nuisance suits.

In 1973, this Court established that federal regulation of aviation is so pervasive that it

leaves no room for local regulation. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). However, this Court reserved the question of an airport proprietor's right to adopt its own noise control measures. Id. at 635, n. 14. Subsequently, Congress answered this question and gave proprietors the authority to do so. Airline Deregulation Act of 1978, Pub. L. 95-504, § 105, 92 Stat. 1708, 49 U.S.C. § 1305. In passing the Airline Deregulation Act of 1978, Congress stated in section 105(b)(1):

> "Nothing in . . . this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietory powers and rights."

Id. In commenting on this section, the Chairperson of the Senate Commerce Committee said that "it was not the intent of the Senate conferees to limit in any way the normal exercise of the

existing proprietors' powers to place nondiscriminatory restrictions on the operations at an airport, subject to Constitutional and statutory limitations". 124 Cong. Rec. 37, 419 (1978) (statement of Sen. Cannon). Hence, Congress has expressly granted airport proprietors authority over noise control measures. Since this authority is not preempted, liability for the detrimental use of this authority should not be preempted either. A public entity should be responsible for those acts over which it has control.

Furthermore, nuisance actions for airport noise, fumes, and vibration are not novel and certainly not unknown to Congress. Yet, in the wake of this Court's City of Burbank decision, Congress saw fit to maintain the status quo and made no attempt to bar state damage remedies for the harmful effects of jet flights over residential neighborhoods. In contrast, California law-

makers had passed legislation as early as 1859 which made it more difficult to obtain damages for the harmful effects of airports. Cal. Civ. Proc. Code § 731(a) (West 1980). Congress has made no similar move. Nevertheless, petitioner now asks this Court to legislate in behalf of Congress what Congress refrained to do itself.

C. Supreme Court Precedent and Federal Case Law Support Continuing Nuisance Liability for Airports.

More than twenty years ago, this Court upheld the propriety of liability for intrusive airflights over residential areas. See Griggs v. County of Allegheny, 369 U.S. 84 (1962). In the Griggs case, the plaintiff sought damages for jet flights that originated and touched down at a nearby county airport. This Court upheld that plaintiff's right to sue the county for damages.

Similarly, in the case at bar, respondent homeowners are also seeking damages for the harm caused by passing aircraft. Unlike the Griggs' plaintiff, however, respondents not only seek compensation for the air easement over their homes, but also seek damages for the interference with their health and peaceful home life. Nevertheless, this difference in damages sought should be of no Constitutional moment. If suits for property damages are consistent with the supremacy clause, then suits for personal injury damages are no less consistent. Only local regulation of airports is preempted by Supreme Court precedent, not local damage actions. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

Moreover, the right to sue in state court for an airport nuisance is not unfamiliar to this Court. In 1980, this Court denied certiorari in

a case where nuisance liability was imposed on an airport at the State level. Greater Westchester Homeowners Assn. v. Los Angeles, 26 Cal. 3d. 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), cert. denied, 449 U.S. 820 (1980). In addition, the only federal court to entertain such a suit has recognized a state cause of action. In Luedtke v. County of Milwaukee, 521 F 2d 387 (7th Cir. 1975), the Seventh Circuit held that an airport proprietor could be liable for a state law nuisance if the airport failed to comply with federal regulations. The California Supreme Court's decision below is consistent with this holding. An airport proprietor would be liable in California only for those operations not preempted by federal control. Not only did the California Supreme Court recognize "that federal law precludes interference with commercial flight patterns and schedules", 39 Cal. 3d at 872, but past California precedent confines liability to

operations over which an airport has "substantial proprietary control". Greater Westchester Home-Owners Assn., 26 Cal. 3d at 97.

Furthermore, liability for nuisance will in no way harm the preemptive wall built around air flight by City of Burbank. On the contrary, airports will remain free from local regulation and the only decisions affected will be those subject to local proprietary control. Even proprietary decisions will not be the subject of direct local regulation. Such decisions will be no more controlled by private nuisance suits than they are by suits in inverse condemnation -- yet the latter are decidedly Constitutional. See Griggs v. County of Allegheny, 369 U.S. 84 (1962). Indeed, the "just compensation" requirement has never kept local or federal government from taking land; it only keeps them honest when they do so. Likewise, under nuisance law, an airport

remains free to control air traffic patterns, operational procedures, or curfews. Only when it abuses its power must it answer to the law of nuisance by way of damages. Hence, a nuisance cause of action will preserve responsible decision making by local entities and prevent the lawless abuse of their power.

Finally, by declaring state nuisance suits preempted, this Court would raise airport nuisance to a federal cause of action cognizable only in the federal courts. This seems a strange result when petitioner readily accepted the jurisdiction of the California courts. Petitioner could thereby accomplish indirectly at the highest level what it failed to do at the pleading stage. Current federal case law recognizes no such exclusive jurisdiction. See Luedtke v. County of Milwaukee, 521 F. 2d 387 (7th Cir. 1975); Pirolo v. City of Clearwater, 711 F. 2d 1006, 1009 (11 Cir. 1983).

II

INTERSTATE COMMERCE REMAINS PROTECTED UNDER THE CALIFORNIA LAW OF CONTINUING NUISANCE

A. The Affect of Nuisance Liability on Interstate Commerce was Never At Issue in the State Courts.

As with the question of federal preemption, the interstate commerce clause was never raised as a defense in the state courts. Petitioner proffers it now as an attempt to gain this Court's ear; yet, it is well established that issues brought for review by certiorari must necessarily have been argued in the lower courts. Brennan, State Court Decisions and the Supreme Court, 31 Penn Bar Assn. Q. 393, 399-400 (1960). Otherwise, issues are denied the ripening of a full season of lower court debate. Moreover the state judiciary risk reversal without ever having ruled

on the matter. For these reasons, a debate over the scope of the interstate commerce clause should not be entertained for the first time on review.

B. Evenhanded, Legitimate, Local Action is Constitutional Unless its Burden on Interstate Commerce is clearly Excessive

During the period since the Constitutional Framers first vested the federal government with the power to regulate interstate commerce, this Court has kept a careful vigil to protect this power from usurpation by parochial state interests. As early as 1829, Chief Justice Marshall reviewed the effect of state action upon interstate commerce. Willson v. Black Bird Creek Marsh Co., 2 Pet. 245 (1829). Since then, a considerable body of case law has evolved dealing with the power of a state to affect interstate commerce in the absence of federal regulation. See e.g.

Kassell v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (state interest weighted against interference with interstate commerce); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (relative weights of state and national interests are measured); Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299 (1851) (states may not regulate interests requiring national uniformity.

The modern approach to testing the Constitutionality of state laws affecting interstate commerce is to balance the competing federal and state interests. This approach was succinctly outlined in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). In rephrasing the accepted test, Justice Stewart stated for a unanimous Court:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

> upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (citation) If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

397 U.S. at 142. Therefore, a law that is decidedly local, legitimate and evenhanded will pass constitutional muster unless interstate commerce is excessively burdened.

C. State Nuisance Liability for Airports Imposes no Undue Burden on Interstate Commerce.

The constitutionality of a law affecting interstate commerce is tested by first determining if the state's action is of local concern, legitimate purpose, and evenhanded application. Pike 397 U.S. at 142. Private nuisance liability for airports

meets all of these tests. In the case at bar, respondent homeowners have sought recovery for the airport's interference with their health and home life. The constant stream of airflights with their noxious side effects are certainly of local concern. In fact, the local law which created the airport authority also charged it to "diligently pursue all reasonable avenues available to insure that adverse effects of noise are being mitigated". Cal. Gov't Code § 6546.1 (West 1980).

Moreover, the protection of health and safety has always been considered a legitimate state goal. In fact, "'if safety justifications are not illusory, the court will not second guess legislative judgment about their importance in comparison with related burdens on interstate commerce.' (citation). Those who would challenge such bona fide safety regulations must overcome a 'strong presumption of validity'." Kassell v. Consolidated Freightways Corp.,

450 U.S. 662, 670 (1981). Airport nuisance liability is just such a bona fide measure since its goal is to compensate local residents for the harmful effects of unnecessary nuisances.

In addition to being of local concern and having a legitimate purpose, nuisance liability also operates evenhandedly. Evenhandedness requires that the burdens of state action not fall entirely on those outside of the state -- burdens must be shouldered evenhandedly by both those without and those within a state. The evil this requirement seeks to avoid is aptly stated by Justice Stone in South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938):

> "(W)hen the regulation is of such character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the (state)."

State nuisance liability for airports avoids this pitfall since the burden of such liability falls substantially on local airport proprietors as well as local airlines. Their combined political voice was avilable to insure that local lawmakers considered the effect of nuisance liability on air transportation.

After determining that state action is of local concern, legitimate purpose, and evenhanded application, a court must determine the extent of the burden placed upon interstate commerce. The California scheme in question is so narrowly drawn that the burden on interstate commerce is slight. Under California law a plaintiff must show that a defendant employes "unnecessary and injurious methods of operation" in order for an airport to be deemed a nuisance. Cal. Civ. Proc. Code § 73(a) (West 1980). This makes it difficult to show that an airport has indeed created

a nuisance. In addition, California law would only hold an airport proprietor liable for decisions over which it has control. This precludes any interference with the federally-regulated aspects of air transportation. See Greater Westchester Homeowners Assn. v. Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329 (1979) cert. denied, 449 U.S. 820 (1980). By implication, Congress left certain decisions to the parochial control of local airport proprietors because they assumed such control would not unduly burden interstate commerce. Based on that assumption, holding proprietors liable for those decisions will not have the uniformity of national air transportation.

In determining whether the burden that a scheme places on interstate commerce is "clearly excessive", a court must look at the "nature of the local interest involved". Pike v. Bruce

Church, Inc., 397 U.S. at 142. In this case, respondents desire compensation for damages to their health, property, and tranquility. Such health and safety measures are schemes which this "Court has been most reluctant to invalidate." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981). In sharp contrast, local laws aimed at economic protectionism are rarely upheld. This deference to health and safety measures was noted by Justice Jackson in U.P. Hood & Sons v. DuMond, 336 U.S. 525, 533-35 (1949):

> "(The) distinction between the power of the state to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law. . . . This court has consistently rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the

> state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety.

Therefore, nuisance liability, as an attempt to protect those subject to the harmful effects of airport noise, smoke, and vibration, is a valid state measure worthy of great deference.

Finally, an otherwise constitutional scheme will be upheld if no alternative scheme exists that would have a "lesser impact on interstate activities". Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In the case at bar, no such alternative scheme exists. The only other means available to compensate homeowners is through an action in inverse condemnation. However, inverse condemnation is no less burdensome on interstate commerce. While nuisance liability requires only the payment of accrued damages, inverse condemnation requires payment

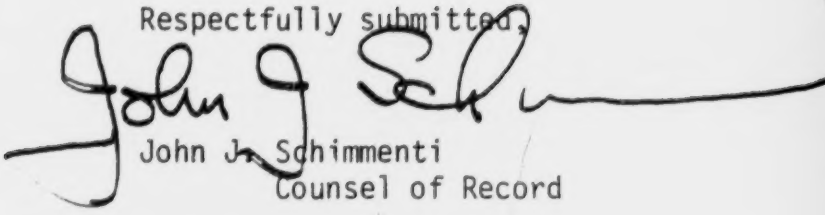
of all damages, past and future -- a highly speculative award. Hence, under inverse condemnation, an airport would be liable for damages it might never create. As a result, airport nuisance liability is the least restrictive means available to compensate the victims of unnecessary noise, fumes, and vibration.

CONCLUSION

The California Supreme Court in Baker v. Burbank-Glendale-Pasadena Airport Authority interpreted California nuisance law in a manner consistent with this Court's past precedents and federal law. Because issues of constitutional dimension were never raised below, and because the decision below nevertheless conforms with constitutional standards, respondents respectfully oppose the Petition for Writ of Certiorari

and ask that it be denied.

Respectfully submitted,



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APPENDIX A

APPENDIX

Petitioner's Second Supplemental Memorandum in Support of Demurrer to Amended Complaint

Defendant Burbank-Glendale-Pasadena Airport Authority (the "Airport") respectfully submits the following Supplemental Memorandum in Support of Demurrer to Amended Complaint.

I. Preparatory Statement

The crucial question in termining the viability of the Airport's demurrer to plaintiffs' inverse condemnation cause of action is whether California Government Code Section 6546.1 prohibits the Airport from condemning avigation easements over plaintiffs' properties. The Court has asked the parties to submit briefs analyzing the legislative history of Section 6546.1 and to focus, in particular, on the amemdment to that Section adopted in 1978 by the passage of S.B.

1364.

As the record of S.B. 1364 demonstrates, the Legislature carefully considered the language utilized to limit the Airport's eminent domain power. A Legislative Counsel's opinion was solicited and obtained as to the meaning of the phrase "fee title" in the final version of the bill. As the following analysis demonstrates, the facts compel the conclusion that, as amended in 1978, Section 6546.1 restricts the Airport from condemning easements.

II

The Legislature was aware that "Fee Title" Included Title to Easements

As we noted previously, the portion of Government Code Section 6546.1 (hereinafter "Section 6546.1") which prohibits the purchase of fee title to condemned real property was added by S.B. 1364 on March 24, 1978. During considera-

of the amendment to Section 6546.1, State Senator Newton R. Russell, the author of S.B. 1364, requested the Legislative Counsel's Office to advise the Legislature concerning the effect of a proposal to add the words "fee title" to the bill. Senator Russell's request is attached as Exhibit "A" to the Declaration of Kay Lentz filed concurrently herewith. The Legislative Counsel's opinion is attached thereto as Exhibit "B".

In interpreting the phrase "fee title", the opinion of Legislative Counsel principally relies upon Civil Code Section 762. That Section and the Legislature Counsel opinion define a "fee" as every estate of inheritance. "Fee title" was defined by Legislative Counsel as "the property or fee which is inheritable. . ." (Emphasis added). The Legislature was, therefore, fully aware of the broad scope of the term "fee title", under California law. Indeed, the case

law is clear that the definition of "fee" in Civil Code Section 652 has always included easements which are transferable or inheritable. See Gerhard v. Stephens, 68 Cal.2d 85, 884-85 (1968); Johnson v. Ocean Shore Railroad Co., 16 Cal.App.3d 429, 434-35 (1971). See also, Red Bluff Developers v. County of Tehama, 258 Cal. App.2d 668, 671-72 (1968).

The specific question in Gerhard was whether a profit a prendre could be lost by abandonment notwithstanding the rule that legal title to a fee simple could never be abandoned. Gerhard acknowledged that the common law applied identical principles to both easements and profits. Gerhard outlined those principles and they are the rules which control the meaning of the language used by the Legislature in this case.

The California Supreme Court held, in Gerhard, that an easement is an estate in real property; if the easement is unlimited in duration,

it is a freehold interest, an estate in fee, and real property. Moreover, this estate in real property is necessarily granted and held separate and apart from the surface title. It is a valuable interest which may be transferred or inherited. 68 Cal.2d at 877-81. The Court in Gerhard summarized these attributes:

> "'(T)he interest in land which an easement constitutes is real property and itself may be held in fee simple . . . .' (Highland Realty Co. v. City of San Rafael (1956), 46 Cal.2d 669, 677 fn. 1 (298 P.2d 15); Appeal of North Beach & M.R.R. Co., supra, 32 Cal. 499, 509; City of Glendora v. Faus (1957), 148 Cal.App.2d 920, 291 (307 P.2d 976); Ocean Shore R.R. Co. v. Doelger (1954), 127 Cal.App.2d 392, 398-399 (274 P.2d 23); Irvin v. Petitfils (1941), 44 Cal.App.2d 496, 500 (112 P.2d 688); Eastman v. Piper 91924), 68 Cal.App.2d 554, 562 (299 P. 1002); 17 Cal. Jur. 2d Easements, §2 pp. 90-91). 68 Cal.2d at 881.

The Court in Gerhard specifically refered to Civil Code Section 762, citing that Section for the proposition that the word "fee" refers to any estate of inheritance as opposed to a description of the possessory rights of surface

ownership. 68 Cal. 2d at 884-85. Indeed, the Court traced the attribute of inheritability of an easement as far back as Blackstone's Commentaries. 68 Cal.2d at 885.

Given this context, it is manifest that the Legislature's choice of the words "fee title" in S.B. 1364 was not a case of poor draftsmanship or inadvertence. The extent of the limitation of the Airport's power to condemn was the subject of focused inquiry resulting first in the proposed addition of the phrase "fee title" to Section 6546.1, and ultimately, in a Legislative Counsel's opinion. The scope of the term fee title was was therefore known to the Legislature to include easements and it must be so construed to effectuate the legislative intent. This construction is not only compelled by the legal analysis conducted by the legislators but, as demonstrated below, is essential to the proper operation of Section 6546.1.

III

The Prohibition against Acquisition of Air Easements is Consistent with the Legislature's Purpose in Enacting Section 6546.1.

As detailed in the Airport's Supplemental Brief filed on January 12, 1983, Title 21 of the California Administrative Code defines a "Noise Impact Area" as the sum, in square statute miles, of all "Incompatible Land Uses" within the "Noise Impact Boundary". Chief among incompatible land uses is residential property, and the law requires that all such incompatible uses be eliminated from within the noise impact boundary.

Attached hereto as Exhibit "A" is a conceptual sketch that appears in the California Administrative Code which demonstrates these concepts as they apply to a hypothetical airport. The sketch identifies by cross-hatching those areas within

the noise impact boundary which are incompatible (i.e., residential) and which must be eliminated. This is the "noise impact area". In terms of this sketch, the law requires that all cross-hatched areas be eliminated. There are at least three ways for the hypothetical airport depicted in Exhibit "A" to accomplish this legislative mandate.

The first would be to operate the airport such that the noise impact boundary would shrink to encompass only the area shown as zoned for airport, industrial or commercial uses. Such a result is patently unlikely absent the elimination of all jet aircraft or similarly drastic operational modifications. A second alternative potentially available to an airport would be the conversion of residential communities by the condemnation and purchase of all residential areas within the existing boundary. There is no dispute that this alternative is unavilable to the

Burbank-Glendale-Pasadena Airport by virtue of Section 6546.1. A third alternative is the condemnation and purchase of air easements over the cross-hatched areas. This alternative is generally available because Title 21 defines property subject to an avigation easement, including residential property, as a compatible land use. As a compatible land use, such property is not included in the calculation of the noise impact area.

As originally enacted in 1976, Section 6546.1 prohibited activities which resulted in an increase in the size of the noise impact area based on a community noise equivalent level of 70 decibels. It did not and does not now prohibit an increase in the size of the noise impact boundary. Therefore, if the facilities had been sold to the Airport Authority prior to the 1978 amendment, the Airport would have had the authority to condemn avigation easements over

residentially zoned property and thereby eliminate all existing incompatible land uses within the noise impact boundary. Indeed, under the pre-1978 Section, the Airport could actually increase the size of the boundary, as long as it condemned sufficient avigation easements.

The Legislature was willing to support the transfer of the Airport from Lockheed Air Terminal, Inc. only on the condition that such a transfer would not increase the adverse effects of noise on the surrounding community or result in an expansion of airport operations. The 1978 amendment to Section 6546.1 ensures that result by prohibiting the Airport from complying with Title 21 through the use of the power of condemnation. Prior to that amendment, the Airport could have complied with the letter but not the intent of Section 6546.1. Thus the Legislature must be considered to have intended to prohibit the Airport from condemning easements in resi-

dential property.

Plaintiffs have suggested that the prohibition against condemnation deprives them of a vested remedy. In passing Section 6546.1, however, it was never the intent of the Legislature to give plaintiffs a new remedy. Plaintiffs, who presumably reside near to or within the Airport's noise impact area, had a statutory nuisance remedy which they lost because they failed to act reasonably promptly after determining that airport operations unreasonably interfered with the use and enjoyment of their property. The Legislature had no constitutional duty to afford these plaintiffs a new remedy merely because the Airport was transferred from a private entity to public ownership.

Plaintiffs never had an inverse condemnation remedy against Lockheed Air Terminal, Inc., the Airport's predecessor. That is the holding of Abacherle. Therefore, when the facilities were

transferred to the Airport, plaintiffs lost nothing. There is simply no legal basis to the assertion that the Legislature's restriction upon the ability to condemn property somehow worked a forfeiture of their rights amounting to an ex post facto application of the law. The statute can and does operate only in a prospective manner.

IV

Conclusion

The Legislature added the term "fee title" to Section 6546.1 knowing that the term encompassed any rights in real property subject to ownership in fee including an easement. This was a considered decision by the Legislature intended to aid in managing the noise problem at the Airport. In essence Section 6546.1 is a legislative directive to the Airport to operate the facilities in such a manner as to reduce the impact of noise. It is beyond doubt that the

Legislature did not wish the Airport to achieve compliance with this mandate by purchasing avigation easements. As it is thus barred by statute from condemning such easements, the Airport cannot, as a matter of law, be liable in inverse condemnation for failing to exercise a power it lacks. The demurrer to the First Cause of Action in the Amended Complaint is well taken and should be sustained. The demurrer to the Second Cause of Action having previously been sustained, judgment in favor of the defendant should be entered.

Kadison, Pfaelzer, Woodard,

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James I Ham

by MICHAEL C. KELLEY
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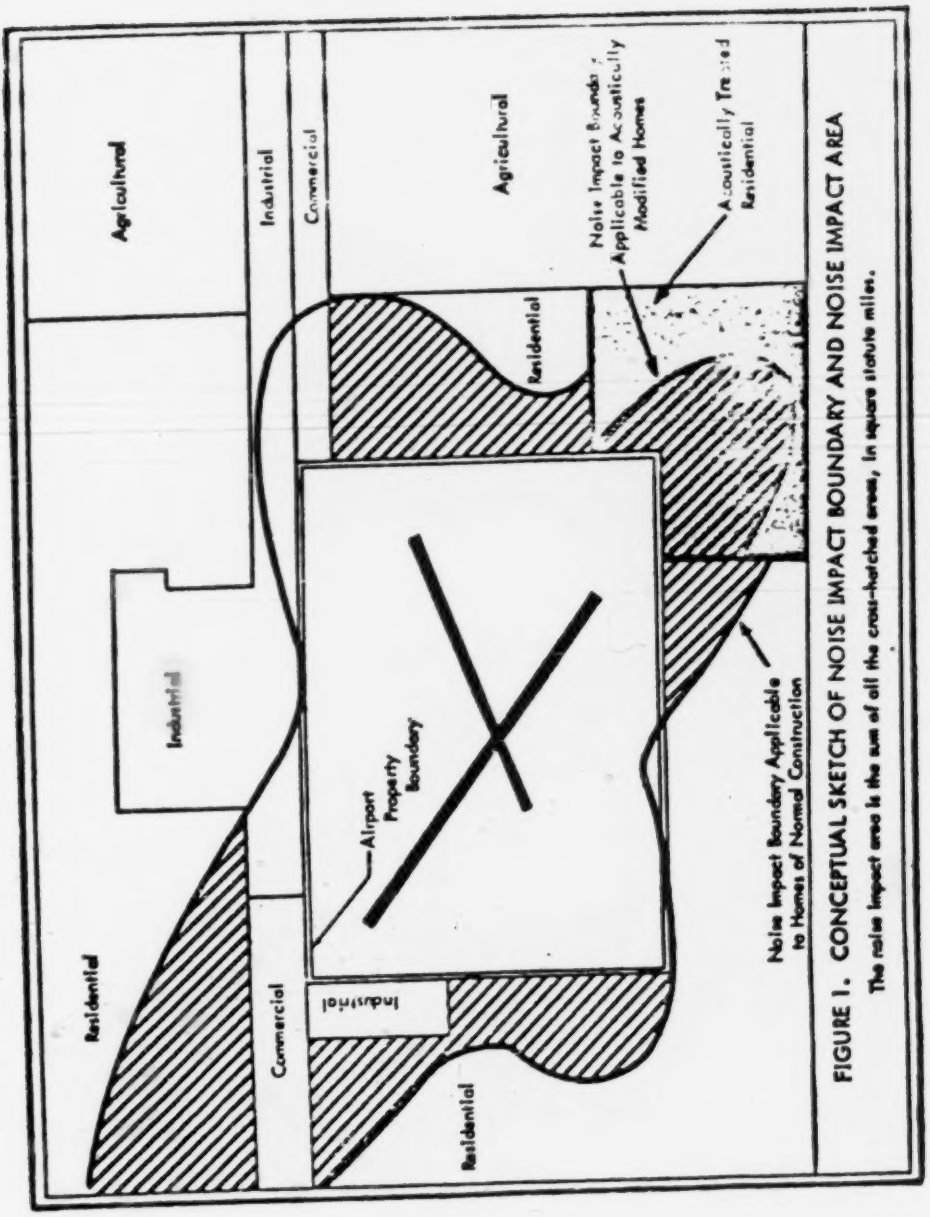

FIGURE 1. CONCEPTUAL SKETCH OF NOISE IMPACT BOUNDARY AND NOISE IMPACT AREA

EXHIBIT "A"

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, January 22, 1986, I served the within RESPONDENTS' BRIEF IN OPPOSITION in re: "Burbank-Glendale-Pasadena Airport Authority vs. Kenneth L. Baker, et al." in the United States Supreme Court, October Term, 1985, No. 85-1101.

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

MICHAEL C. KELLEY
KADISON, PFAELZER, WOODARD,
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Fortieth Floor
707 Wilshire Blvd.
Los Angeles, CA 90017

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on January 22, 1986
at Los Angeles, California.

Kathleen Kabakack

Supreme Court, U.S.
FILED
JAN 28 1986
JOSEPH SPANIOL, JR.
CLERK

No. 85-1101

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY,
Petitioner,

vs.

KENNETH L. BAKER, *et. al.*,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND SUGGESTION THAT THE VIEWS OF THE FEDERAL AVIATION ADMINISTRATION BE SOUGHT

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TABLE OF CONTENTS

	Page
ARGUMENT	1

TABLE OF AUTHORITIES CITED

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 2

No. 85-1101

In the Supreme Court
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BURBANK-GLENDALE-PASADENA
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VS.

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Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND SUGGESTION THAT THE VIEWS OF THE FEDERAL AVIATION ADMINISTRATION BE SOUGHT

Petitioner Burbank-Glendale-Pasadena Airport Authority respectfully submits to this Court its Reply to Respondents' Brief in Opposition to Petition for Certiorari to the Supreme Court of California, and respectfully suggests that the issues raised by the Petition so directly impact upon the functions and authority of the Federal Aviation Administration with respect to jet aircraft noise regulation that the Solicitor General's office should be asked to present the government's views on the instant Petition.

The jurisdiction of this Court to review the decision below is beyond doubt. The California Supreme Court based its holding that public airports are continuously liable for the by-products of jet aircraft operations on the premise that "Federal preemption of local regulation of airport noise is not absolute." 39 Cal.3d at 872. The issue thus presented is not whether all damage awards against airport proprietors are unconstitutional, but whether the decision below extends improperly that liability, thus permitting state regulation to intrude into preempted areas of aircraft noise control and unduly burden interstate commerce. Indeed, as respondents are forced to admit, petitioner raised this very issue when arguing below that if airport operations constitute a nuisance at all, then they must be classified as permanent. (Respondents' Brief In Opposition at pp. 7-8).

The respondents' opposition brief frames in bold relief improper and intrusive state regulation of airport noise that will result if the decision below is not reviewed. While respondents assert that the decision below will not interfere with areas protected from parochial interference, they contend, nevertheless, that because airports are "free to control air traffic patterns, operational procedures, or curfews", their decisions will subject them to local scrutiny and liability. (Respondents' Brief In Opposition at pp. 16-17). Yet, these are precisely the type of operational decisions this Court found exempt from local regulation in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 636-39 (1973), and which the Federal Aviation Administration ("FAA"), not airport proprietors, should control.

The Airport Authority noted in its Petition that the FAA — the entity responsible for regulating the national system of air transportation, including jet aircraft noise control — has taken the position in other pending litiga-

tion that court action aimed at reversing operational decisions of airport proprietors is preempted. (Petition at p. 13). The FAA's position in that litigation evidences a view of the scope of federal preemption that is much broader than respondents are willing to concede.

The FAA's views concerning its responsibility for and control over jet aircraft noise control, and its interest in application of the principles announced in *City of Burbank,* are matters which this Court should consider. The Airport Authority respectfully suggests that a formal presentation of those views in these proceedings would be valuable to the Court in assessing the nature and scope of the impact of the decision below on the national air transportation system and the appropriateness of granting this Petition. Accordingly, the Airport Authority requests that the Court seek the views of the FAA on these issues and that the Solicitor General be invited to file an *Amicus Curiae* brief addressing the question of whether Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 28, 1986, I served the within Respondents' Brief in Opposition to Petition for Certiorari, etc., in re: "Burbank-Glendale-Pasadena Airport Authority v. Kenneth L. Baker *et al.*" in the United States Supreme Court, October Term, 1985, No. 851101, on the Attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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Amicus Curiae
All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 28, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1101

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

BURBANK-GLENDALE-PASADENA
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Respondents.

BRIEF OF AMICUS CURIAE CITY OF LOS ANGELES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Interest Of Amicus Curiae City Of Los Angeles . . .	2
Reasons For Granting The Petition For Writ Of Certiorari	6
1. Preliminary Statement	6
2. The Decision Of The California Supreme Court Is Tantamount To State Regulation Of Airport Operations, Is In Violation Of The Supremacy Clause And Is Contrary To This Court's Decision In *City of Burbank*	6
Conclusion	9
Appendix A1 — Request and Consent to file Amicus Curiae Brief of Respondents' Counsel of Record.	
Appendix A2 — Request and Consent to file Amicus Curiae Brief of Petitioner's Counsel of Record.	

TABLE OF AUTHORITIES CITED

Cases

	Page
Aaron v. City of Los Angeles, 40 Cal.App.3d 471 (1974)	5
Air Transportation Association of America v. Crotti, 389 F. Supp. 58 (1975)	5
Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862 (1985)	5, 6, 7, 8
Chicago and North Western Transportation Co. v. Kalco Brick & Tile Co., 450 U.S. 311 (1981)	8
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)	5, 6, 8, 9
Greater Westchester Homeowners Association v. City of Los Angeles, 26 Cal.3d 86 (1980)	5, 6, 7
Griggs v. County of Allegheny, 369 U.S. 84 (1962)	4, 5
Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975)	9
San Diego Building Trades Council, Local 2020 v. Garmon, 359 U.S. 236 (1959)	8
San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981)	5

Rule

Rules of the United States Supreme Court, Rule 36	1

Statute

California Administrative Code, Title 21, Secs. 5000-5080 (1977)	5, 7

No. 85-1101

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Respondents.

BRIEF OF AMICUS CURIAE CITY OF LOS ANGELES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 36, the City of Los Angeles, California, a municipal corporation, acting by and through its Board of Airport Commissioners, respectfully submits this brief, *Amicus Curiae,* in support of the Burbank-Glendale-Pasadena Airport Authority's Petition for Writ of Certiorari.

Counsel of Record for all parties have consented to the filing of this brief. Copies of the consent letters are filed herewith and contained in Appendix A.

INTEREST OF AMICUS CURIAE CITY OF LOS ANGELES

Your *amicus curiae,* City of Los Angeles, owns and operates Los Angeles International Airport (LAX), the world's third busiest commercial airport serving approximately 37 million annual passengers; Ontario International Airport (ONT), serving approximately 3.4 million annual passengers; and Van Nuys Airport (VNY), the world's busiest general aviation airport. LAX and ONT each serve the entire western region of the United States, and they have a major impact on interstate commerce and the economy of southern California and the western region. LAX accommodates the operations of numerous foreign flag carriers as well as every major domestic trunk air carrier operating in the United States, and it is the southern terminus of one of the most heavily traveled air corridors in the world.

As a result of court determinations regarding liability, the City of Los Angeles has expended approximately $30 million to satisfy judgments and to resolve litigation involving noise related inverse condemnation and nuisance actions at LAX. The City has thereby acquired avigation easements in approximately 800 properties, the majority of which are residential. Additionally, since 1965, the City of Los Angeles has acquired approximately 396 acres of land in the vicinity of LAX where noise was one of the paramount considerations for the acquisition of the property interests. The approximate cost for the fee acquisition of these property interests was $95,000,000.

Currently, nineteen inverse condemnation and nuisance lawsuits involving LAX are pending against the City of Los Angeles. In these actions, approximately 750 plaintiffs have prayed for personal injury and emotional distress damages in excess of $17 million, and they have

prayed for approximately $23 million in damages involving approximately 440 properties. In addition, as the proprietor of ONT, the City of Los Angeles is also defending itself against noise related inverse condemnation and nuisance actions brought by approximately 800 plaintiffs alleging in excess of $35 million in damages to themselves and approximately 300 properties.

Moreover, in addition to the acquisition of avigation easements and the property interests described above, the City of Los Angeles has undertaken, among other measures, the following noise mitigation efforts at LAX in order to reduce the impact of jet aircraft noise in the surrounding communities:

1. Adopted a noise regulation requiring compliance with Federal Aviation Regulation (FAR) Part 36 noise standards by all affected aircraft.

2. Adopted and implemented various noise abatement procedures including, but not limited to, nighttime, over-ocean approach patterns.

3. Implemented a soundproofing program for residential properties.

4. Commenced the Airport Noise Control Land Use Compatibility (ANCLUC) Program (FAR Part 150) where the primary objective is to assess land uses and aircraft operational procedures in an effort to achieve land use compatibility and reduce noise impacts.

5. Constructed a 20-foot high by 1,500-foot long, well-landscaped sound barrier wall that substantially reduces aircraft noise at adjacent residential properties.

6. Adopted numerous other noise mitigation measures at ONT and VNY.

The foregoing list is not exhaustive, but it is meant to illustrate some of the measures instituted by the City of Los Angeles as an airport proprietor that has been held by the courts to have the sole responsibility for the damages caused by aircraft noise at its airports. *Griggs v. County of Allegheny,* 369 U.S. 84 (1962).

However, notwithstanding the City of Los Angeles' efforts to reduce the impact of jet aircraft noise in the communities surrounding LAX, ONT and VNY, this City has not succeeded in protecting itself from litigation. For example, in *Iglarsh v. City of Los Angeles,* Los Angeles Superior Court No. C 278471, five families living in the homes that benefited most by the sound barrier wall alleged not only property and personal injury damages in excess of one million dollars, but further alleged that the well-landscaped wall was an eyesore that depreciated their property values. Moreover, in a number of current lawsuits, homeowners that previously recovered damages from, and granted avigation easements to the City of Los Angeles, have sued the City a second time alleging that the City's direct condemnation efforts reduced the value of their properties. (Residents in the vicinity of LAX are not the only parties that have instituted litigation against the City of Los Angeles relative to noise issues. The City was also sued when it attempted to enforce its noise regulation implementing FAR Part 36 noise standards. *Empresa Ecuatoriana De Aviacion v. City of Los Angeles, et al.,* United States District Court for the Central District of California, No. 85-811 HLH.)

In short, a complete review of noise abatement measures and jet noise litigation involving LAX would reveal that barriers, buffers, easements, and other noise reduc-

ing devices have not insulated the City of Los Angeles from lawsuits or liability.

Additionally, the State of California, through its existing regulatory authority, actively encourages airport operators, including the City of Los Angeles, to take positive steps to reduce the noise impacts resulting from airport operations. (21 Cal.Admin.Code §§ 5000-5080 (1977).) It should be noted however, that consistent with *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the courts have upheld the State's regulatory authority only when it has involved monitoring, shielding, ground level facility configurations, and development of compatible land uses. *Air Transportation Association of America v. Crotti,* 389 F. Supp. 58 (1975); *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (the State may not dictate aircraft operational procedures).

Nevertheless, and notwithstanding the existing rights afforded to local residents and the State to encourage noise mitigation efforts, the California Supreme Court now further allows local residents to bring successive actions for damages against airport proprietors in a federally preempted area for an activity that cannot be abated. *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal.3d 862 (1985). (Prior to *Baker*, plaintiffs in California already enjoyed the right to bring actions at law sounding in inverse condemnation and/or nuisance to recover just compensation for the taking or damaging of their property and for personal injury and emotional distress. *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86 (1980); *Aaron, et al. v. City of Los Angeles*, 40 Cal.App.3d 471 (1974); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962).)

Your *amicus curiae* has set forth its interest in this case and submits that the decision below will allow non-proprietary regulation of aircraft operations. Therefore, it is respectfully requested that this Court adopt the dissenting opinion by Justice Mosk below in *Baker* wherein he stated that the majority's disposition of the nuisance cause of action potentially subjects the "airport to repeated and vexatious litigation based on the same nuisance." 39 Cal.3d at 874.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement.

Your *amicus curiae*, City of Los Angeles, adopts by reference the brief of Petitioner, Burbank-Glendale-Pasadena Airport Authority in the Petition for Writ of Certiorari.

2. The Decision Of The California Supreme Court Is Tantamount To State Regulation Of Airport Operations, Is In Violation Of The Supremacy Clause And Is Contrary To This Court's Decision In *City of Burbank*.

The California Supreme Court has acknowledged the airport proprietor's inability to abate the nuisance created by aircraft operations. In this regard, the Court stated that "... federal law precluding interference in any way with flight patterns and schedules adds an element of permanency to an otherwise continuing problem ...." *Baker*, 39 Cal.3d at 873. The same Court also stated the following in *Greater Westchester Homeowners Assn. v. City of Los Angeles*, 26 Cal.3d 86 (1980):

> "[C]ommercial flights which are conducted in strict compliance with federal regulations may not be en-

> joined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law." 26 Cal.3d at 94.

Nevertheless, the California Supreme Court has opined below that:

> "... [D]espite the fact that the flights to and from the airport are privileged, defendant shoulders an affirmative responsibility to minimize noise levels through the use of buffers, barriers or noise reducing devices." 39 Cal.3d at 873.

However, as the facts described above illustrate, and what the California Supreme Court does not address or recognize, is that remedial measures, such as barriers, buffers, and other devices, do not minimize noise levels so as to insulate airport proprietors from continuous litigation and liability. Jet noise can only be abated through the cessation or reduction of aircraft operations. Further, because injunctive relief is unavailable to abate aircraft operations, the decision to allow continuing liability for the same nuisance can only be viewed as an attempt by the State Court to allow third parties to coerce desired operational decisions through repetitive litigation.

The California Supreme Court readily admits that its decision is meant to encourage airport proprietors to take remedial noise control measures (*Baker*, 39 Cal.3d at 873). However, as described herein, available judicial remedies and the existing State noise statutes (21 Cal.Admin.Code §§ 5000-5080), already operate to encourage the type of remedial noise control efforts recommended by the Court in *Baker*. Therefore, it is submitted that the true impact of the decision will allow third parties to regulate aircraft operational procedures

through judicially created economic coercion. In other words, the decision below will allow third parties and the State of California, through the courts, to control indirectly what they cannot control directly, and the result will be contrary to this Court's decision in *City of Burbank,* 411 U.S. 624, 639, wherein it was recognized that non-proprietary control of aircraft operations would be detrimental to air commerce.

> "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow." 411 U.S. at 639.

Additionally, as the dissent in *Baker*, 39 Cal.3d 862, 876 recognized:

> "*City of Burbank* plainly established that the delicate federal/local-proprietor noise control scheme currently in effect will not tolerate private suits seeking mandatory imposition of local noise controls. (Cf. *San Diego Unified Port Dist. v. Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1316-1319, cert. denied (1982) 455 U.S. 1000 [71 L.Ed.2d 866, 102 S.Ct. 1631] [state may not direct an airport proprietor to exercise its noise abatement power].)" 39 Cal.3d at 876.

Moreover, in addition to the foregoing, this Court has made it clear that a state court's imposition of damages in a federally preempted field is tantamount to state regulation or judicial injunction, and such conduct by a state court violates the Supremacy Clause of the United States. *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236 (1959); *Chicago and North Western Transportation Co. v. Kalco Brick & Tile Co.*, 450 U.S. 311 (1981).

CONCLUSION

Federal laws and regulations have preempted non-proprietary control of aircraft operations, and such operations cannot be judicially enjoined or regulated. Nevertheless, residents in the State of California have adequate remedies at law for recovering damages caused by jet aircraft noise, and the State of California, through its legitimate regulatory powers, has the ability to encourage the use of buffers, barriers and other noise reducing devices at California airports.

In light of the foregoing, it is respectfully submitted that the California Supreme Court's attempt to coerce these same remedial measures through repetitive, vexatious litigation amounts to impermissible State regulation of aircraft operations and is a violation of the Supremacy Clause.

It is further respectfully requested that this Court resolve the split in authority that exists between the California Supreme Court decision allowing repetitive nuisance claims and the Seventh Circuit in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975), in favor of the Seventh Circuit where the court ruled that "... to the extent they comply with ... federal laws and regulations," airport proprietors cannot "be charged with negligence or creating a nuisance." 521 F.2d at 391.

The precepts of *City of Burbank*, and the congressional policies that have established the delicate federal/local-proprietor noise regulatory scheme will be best served if the power to regulate and control aircraft operations and noise remains with the federal government and the air-

port proprietor, and not with third parties, including state courts.

DATED: January 21, 1986

Respectfully submitted,

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January 9, 1985

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Re: Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al. Respondents.

Dear Mr. Schimmenti:

The City of Los Angeles, by and through its Board of Airport Commissioners, requests your written consent to its filing of a brief amicus curiae in support of the Petition for Writ of Certiorari in the above-referenced matter.

If Respondents consent to this request, please so indicate in the space provided below and return the original of this letter to the undersigned so that it may be presented to the Court.

Very truly yours,

JAMES K. HAHN, City Attorney

By Emily A. Stevens
EMILY A. STEVENS
Deputy City Attorney

Consent is hereby given to participation by the City of Los Angeles, by and through its Board of Airport Commissioners, as amicus curiae before the Supreme Court of the United States in the case of Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al., Respondents.

Dated: 1/13/86

John J. Schimmenti
Counsel of Record
for Respondents

APPENDIX A1

JAMES H. PEARSON
SENIOR ASSISTANT CITY ATTORNEY

JAMES L. SPITSER
HENRY A. TALIFER
JOHN M. WERLICH
JAMES R. KAPEL
BRETON K. LOBNER
EMILY A. STEVENS
DENISE M. BEAUDRY
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ATTORNEYS FOR THE BOARD
OF AIRPORT COMMISSIONERS

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CITY ATTORNEY

JAMES K. HAHN
CITY ATTORNEY

AIRPORT DIVISION
1 WORLD WAY
LOS ANGELES, CALIFORNIA 90009
TELEPHONE (213) 646-3260

January 9, 1985

Mr. Richard K. Simon
Counsel of Record
Kadison, Pfaelzer, Woodard,
Quinn & Rossi
707 Wilshire Blvd.
Fortieth Floor
Los Angeles, CA 90017

Re: Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al. Respondents.

Dear Mr. Simon:

The City of Los Angeles, by and through its Board of Airport Commissioners, requests your written consent to its filing of a brief amicus curiae in support of the Petition for Writ of Certiorari in the above-referenced matter.

If Petitioner consents to this request, please so indicate in the space provided below and return the original of this letter to the undersigned so that it may be presented to the Court.

Very truly yours,

JAMES K. HAHN, City Attorney

By Emily A. Stevens
EMILY A. STEVENS
Deputy City Attorney

Consent is hereby given to participation by the City of Los Angeles, by and through its Board of Airport Commissioners, as amicus curiae before the Supreme Court of the United States in the case of Burbank-Glendale-Pasadena Airport Authority, Petitioner, vs. Kenneth L. Baker, et al., Respondents.

Dated: January 13, 1985

Richard K. Simon
Counsel of Record
for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 21, 1986, I served the within Amicus Curiae Brief in re: "Burbank-Glendale-Pasadena Airport Authority v. Kenneth L. Baker" in the United States Supreme Court, October Term, 1985, No. 85-1101,

on the Attorneys in said action, by placing 3 copies thereof enclosed in sealed envelopes with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Mr. John J. Schimmenti
Schimmenti, Berberian & De Natale
999 North Sepulveda Boulevard
Suite 602 Airport Imperial Towers
El Segundo, CA 90245

Mr. Richard K. Simon
Counsel of Record
Kadison, Pfaelzer, Woodard, Quinn & Rossi
707 Wilshire Boulevard
Fortieth Floor
Los Angeles, CA 90017

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 21, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA